

No. 195.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

THE CONNECTICUT MUTUAL LIFE
INSURANCE COMPANY,
Plaintiff in Error,

vs.

NANNIE S. McWHIRTER.

*In Error to the United States Circuit Court for the Northern
District of California.*

VALLEAU & OLIVER, PRINTERS, 403 SANSONE ST., S. F.

FILED
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In the Superior Court of the City and County of San Francisco, State of California.

NANNIE S. McWHIRTER,
Plaintiff,
vs.
THE CONNECTICUT MUTUAL LIFE
INSURANCE COMPANY,
Defendant.

Complaint.

The complaint of the above-named plaintiff respectfully shows to the Court:

That at all the dates and times hereinafter mentioned the above-named defendant the Connecticut Mutual Life Insurance Company was a corporation organized and existing under the laws of the State of Connecticut for the purpose of making and issuing policies of insurance upon lives, and that at the dates aforesaid the said defendant was carrying on business in the State of California.

That heretofore, to-wit: on the 18th day of December, A. D. 1891, the above-named plaintiff and one Louis B. McWhirter, now deceased, were and up to the death of the said Louis B. McWhirter, on the 29th day of August, 1892, continued to be such husband and wife.

That heretofore, to-wit: on the 19th day of December, A. D. 1891, the above-named defendant, by its certain policy in writing, dated on that day in consideration of an annual premium of one hundred and eighty-six

and fifty one-hundredths ($\$186.50-100$) dollars to be paid to said defendant on or before the 18th day of December, 1891, and on or before the same date in every year until twenty annual premiums should be paid, did insure the life of the said Louis B. McWhirter of Fresno, in the county of Fresno, in the sum of five thousand ($\$5,000$) dollars, to be paid Nannie S. McWhirter, the plaintiff herein, the wife of the said Louis B. McWhirter, for her sole use and benefit, within thirty days after due and satisfactory evidence of the death of the said insured should have been received at the office of said Company defendant in Hartford, Connecticut, subject to the conditions and agreements upon the second page of said policy, which are as follows: "THIS POLICY is issued and accepted upon the following expressed Conditions and Agreements, referred to on the first page and made a part of this Contract:

" 1st. That this Contract of Insurance is wholly expressed and contained in this policy and the application therefor, and that no alteration, change, modification, waiver or subsequent agreement whatever, respecting this policy shall be binding on said Company unless made in writing signed by the executive officers thereof; and that agents of the Company have no power or authority to make, alter, change, or modify any of the terms, conditions or agreements of this policy, or to waive forfeitures thereof.

" 2nd. That this policy shall not be in force and binding on this Company until the advance premium hereon shall have been actually paid

“ during the lifetime of the insured; and that if any
“ subsequent premium or installment of premium, on
“ this policy be not paid when due, then this policy
“ shall cease and determine and become and be null
“ and void, except as hereinbefore provided after the
“ payment of the requisite number of actual premi-
“ ums; and that no premium on this policy shall be
“ considered as paid unless a receipt shall be given
“ therefor; signed by the President or Secretary of the
“ company, and such receipt is the sole evidence of
“ the authority of any agent to receive any premium
“ on account of this policy; and that all premiums or
“ other payments on account of this policy are paya-
“ ble at the office of the company in Hartford, Conn.,
“ and not elsewhere; but for the convenience of the
“ person paying the same, such receipt may be sent to
“ any agent or correspondent of the company for col-
“ lection, and payment to such agent or correspondent
“ shall be held to have been made at said office of the
“ company.

“ 3rd. That the following risks are not assumed by
“ this company under this contract: Death while re-
“ siding or being or from any disease contracted while
“ residing or being, outside the Temperate Zone, or
“ while personally engaged or employed, or from any
“ accident or injury received while engaged or em-
“ ployed, in making any aeronautic voyage or
“ excursion, or in blasting, mining or in subma-
“ rine operations, or in the manufacture, hand-
“ ling, use, custody or transportation of highly inflam-
“ mable or explosive substances, or upon service on
“ any ocean, sea, sound, inlet, river, lake or railroad,

“ or in any military or naval service whatsoever, in
“ time of war, whether voluntary or otherwise, or as a
“ member of any paid fire department, without the
“ consent of this company previously given in writing;
“ or death in the violation of law, or in
“ consequence thereof, or after conviction of felony,
“ or by self-destruction except upon satisfactory proof
“ that the insured was so far insane as to destroy his
“ responsibility therefor, or in state of drunkenness,
“ or from any accident or violence received while in
“ that state, or from any disease caused by stimulants
“ or narcotics; and if delirium tremens, or any injury
“ to or impairment of the health be caused by them,
“ this policy shall thereupon and thereby be wholly
“ forfeited and terminated.

“ In each and every of the foregoing cases this
“ policy shall become and be null and void; but the
“ company will, upon surrender and satisfactory re-
“ lease hereof within one year thereafter and not
“ otherwise, return to the Assured the then net reserve
“ upon this policy, computed upon the American
“ Table of Mortality and three per centum compound
“ interest less any balance of the year's premium when
“ not all paid at the beginning of the year, and any
“ other indebtedness to this Company on account of
“ this policy.

“ 4th. That in every case in which this policy shall
“ cease and determine or shall become and be null
“ and void, all premiums paid and moneys or credits
“ held on account of the same shall be forfeited to this
“ company, except as hereinbefore provided.

“ 5th. That no assignment of this policy shall be
“ valid; but the company shall have power at any

“ time, but at its own discretion to accept a surrender
“ and discharge of the same by the assured and the
“ payee of the cash value at stipulated periods.

And the plaintiff further alleges that each and all of the several answers, warranties and agreements contained in the application for insurance which was and is the basis of, and a part of the said policy, were and are true in the letter and the spirit thereof and the said warranties and agreements have been performed and made good.

That all premiums due under the said Policy have been paid.

That the said Louis B. McWhirter did not die from any cause in the said policy named, but that he did die on the 29th of August, 1892, at the City of Fresno, County of Fresno and State of California, by being murdered and assassinated by certain persons to the plaintiff unknown. That no assignment of this policy has ever been made.

That due notice and satisfactory evidence of the death of the said Assured Louis B. McWhirter was delivered to and received by the said defendant at its office in Hartford, Connecticut prior to the first day of December, 1892.

That the said defendant although often requested, has not paid the said sum of Five Thousand (\$5,000.00) Dollars nor any part thereof.

II.

And for another and further cause of action, the said plaintiff respectively complains and shows to the Court:

That at all the dates and times hereinafter mentioned, the above-named defendant the Connecticut Mutual Life Insurance Company, was a corporation organized and existing under the laws of the State of Connecticut for the purpose of making and issuing policies of insurance upon lives, and that at the dates aforesaid, the said defendant was carrying on business in the State of California.

That heretofore, to wit: On the 15th day of March, 1892, the above-named plaintiff and one Louis B. McWhirter were and up to the death of the said Louis B. McWhirter, on the 29th day of August, 1892, continued to be husband and wife.

That heretofore, to-wit: on the said 18th day of March, A. D. 1892, the above-named defendant by its certain policy in writing dated on that day, in consideration of an annual premium of two hundred and eighty-nine and fifty one-hundredths (\$289.50-100) dollars to be paid to said defendant on or before the 15th day of March, 1892, and on or before the same date in every year during the continuance of said policy, did insure the life of the said Louis B. McWhirter of Fresno, in the county of Fresno, in the sum of ten thousand dollars to be paid to Nannie S. McWhirter, the plaintiff herein, the wife of the said Louis B. McWhirter for her sole use and benefit within thirty days after due and satisfactory evidence of the death of said insured should have been received at the office of said company defendant in Hartford, Connecticut, subject to the conditions and agreements upon the second page of said policy which are as follows:

“ This policy is issued and accepted upon the following express conditions and agreements, referred to on the first page and made a part of this contract:

“ 1st. That this contract of insurance is wholly expressed and contained in this policy, and the application therefor, and that no alteration, change, modification, waiver or subsequent agreement whatever respecting this policy shall be binding on said company unless made in writing signed by the executive officer thereof; and that agents of the company have no power or authority to make, alter, change, or modify any of the terms, conditions or agreements of this policy, or to waive forfeitures thereof.

“ 2nd. That this policy shall not be in force and binding on this company until the advance premium hereon shall have been actually paid during the lifetime of the insured; and that if any subsequent premium or installment of premium, on this policy be not paid when due, then this policy shall cease and determine and become and be null and void, except as hereinbefore provided after the payment of the requisite number of annual premiums; and that no premium on this policy shall be considered as paid unless a receipt shall be given therefor; signed by the President or Secretary of the company, and such receipt is the sole evidence of the authority of any agent to receive any premium on account of this policy; and that all premiums or other payments on account of this policy are payable at the office of the company in Hartford, Conn., and not elsewhere; but for the convenience of the person pay-

“ ing the same, such receipt may be sent to any agent
“ or correspondent of the company for collection, and
“ payment to such agent or correspondent shall be
“ held to have been made at said office of the com-
“ pany.

“ 3d. That the following risks are not assumed by
“ this company under this contract: Death while re-
“ siding or being, or from any disease contracted while
“ residing or being, outside the Temperate Zone, or
“ while personally engaged or employed, or from any
“ accident or injury received while engaged or em-
“ ployed, in making any aeronautic voyage or excur-
“ sion, or in blasting, mining or submarine operations,
“ or in the manufacture, handling, use, custody or
“ transportation of highly inflammable or explosive
“ substances, or upon service on any ocean, sea, sound,
“ inlet, river, lake or railroad, or in any military or
“ naval service whatsoever in times of war, whether
“ voluntary or otherwise, or as a member of any paid
“ fire department, without the consent of this com-
“ pany previously given in writing or death in the
“ violation of law, or in consequence thereof, or after
“ conviction of felony, or by self-destruction except
“ upon satisfactory proof that the insured was so far
“ insane as to destroy his responsibility therefor, or in
“ a state of drunkenness, or from an accident or vio-
“ lence received while in that state, or from any dis-
“ ease caused by stimulants or narcotics; and if deli-
“ rium tremens, or any injury to or impairment of the
“ health be caused by them, this policy shall there-
“ upon and thereby be wholly forfeited and termin-
“ ated.

“ In each and every of the foregoing cases this
“ policy shall become and be null and void; but the
“ company will, upon surrender and satisfactory re-
“ lease hereof within one year thereafter and not
“ otherwise, return to the Assured the then net re-
“ serve upon this policy, computed upon the Ameri-
“ can Table of Mortality and three percentum com-
“ pound interest less any balance of the year’s prem-
“ ium when not all paid at the beginning of the year,
“ and any other indebtedness to this company on ac-
“ count of this policy.

“ 4th. That in every case in which this policy shall
“ cease and determine or shall become and be null and
“ void, all premiums paid and moneys or credits held
“ on account of the same shall be forfeited to this
“ company, except as hereinbefore provided.

“ 5th. That no assignment of this policy shall be
“ valid; but the company shall have power at any
“ time, but at its own discretion to accept a surrender
“ and discharge of the same by the assured and the
“ payee of the cash value at stipulated periods.”

And the plaintiff further alleges that each and all of the several answers, warranties and agreements contained in the application of insurance which was and is the basis of, and a part of the said policy, were and are true in the letter and the spirit thereof and the said warranties and agreements have been performed and made good.

That all premiums due under the said policy have been paid.

That the said Louis B. McWhirter did not die from any cause in the said policy named, but that he did

die on the 29th day of August, 1892, at the city of Fresno, County of Fresno and State of California, by being murdered and assassinated by certain persons to the plaintiff unknown. That no assignment of this policy has ever been made.

That due notice and satisfactory evidence of the death of the said assured Louis B. McWhirter was delivered to and received by the said defendant at its office in Hartford, Connecticut, prior to the 1st day of December, 1892.

That the said defendant although often requested has not paid the said sum of ten thousand (\$10,000) dollars nor any part thereof.

WHEREFORE plaintiff prays judgment against said defendant for the sum of fifteen thousand (\$15,000) dollars and the costs of this action.

THORNTON & MERZBACH,
THOMPSON & KING,
Attorneys for Plaintiff.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

Crittenden Thornton, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled action; that the said plaintiff is not at present within the State of California, but is within the State of Tennessee; that this affiant is better acquainted with all the facts in this action than the said plaintiff; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the

matters which are therein stated on information and belief, and that as to those matters, he believes it to be true.

CRITTENDEN THORNTON.

Subscribed and sworn to before me, this 7th day of January, A. D. 1893.

W. J. HENEY,

Deputy County Clerk.

[Endorsed]: No. 39,438. Superior Court, City and County of San Francisco, Department No. —. Nannie S. McWhirter, plaintiff, vs. The Connecticut Mutual Life Insurance Company, defendant. Complaint. Filed January 7, 1893. M. C. Haley, Clerk, by W. J. Heney, Deputy Clerk. Thornton & Merzbach, Attorneys for plaintiff.

In the Superior Court of the City and County of San Francisco, State of California.

NANNIE S. McWHIRTER,

Plaintiff,

vs.

THE CONNECTICUT MUTUAL LIFE
INSURANCE COMPANY,

Defendant.

Petition for Removal.

To the Honorable Superior Court of the City and County of San Francisco, State of California:

Your petitioner respectfully shows to this Honorable Court, that it is the only defendant in the above-entitled action and that the time has not elapsed wherein petitioner is required by the laws of the State of

California or by the rules of said Court to answer or plead to plaintiff's complaint in said cause.

That the Summons issued out of this Court in the above-entitled action was served on the agent of defendant in the City and County of San Francisco, State of California, on the 9th day of January, 1893. That the amount in dispute in the above-entitled suit, exceeds, exclusive of costs, the sum of ten thousand dollars.

That the controversy in the said suit is between citizens of different States; and that petitioner was at the time of the commencement of this suit, and ever since has been and still is a corporation, duly organized and existing under and by virtue of the laws of the State of Connecticut, and having its office and principal place of business in the City of Hartford, State of Connecticut; and that your petitioner was, before and at the time of the commencement of this suit, ever since has been and still is a citizen of the State of Connecticut; and that Nannie S. McWhirter, the plaintiff herein, was before and at the time of the commencement of this suit, ever since has been and still is a citizen of the State of California.

That there is, therefore, a controversy in this action, between plaintiff who was before and at the time of the commencement of this action, ever since has been and still is a citizen of the State of California, and said defendant who was before and at the time of the commencement of this action, ever since has been and now is a citizen of the State of Connecticut and a non-resident of the State of California.

That said action is brought to recover a judgment of this Court by said plaintiff against your petitioner for the sum of Fifteen thousand dollars, alleged to be due upon the certain policies of insurance, upon the life of Louis B. McWhirter, deceased; the one in the sum of Five thousand dollars and the other in the sum of Ten thousand dollars.

And your petitioner offers herewith a bond, with good and sufficient surety for its entering in the Circuit Court of The United States, 9th Circuit, in and for the Northern District of California, on the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this Honorable Court to proceed no further herein, except to accept this petition and the said surety and bond, and to cause the record herein, to be removed into said Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, and it will ever pray.

JAS. H. BUDD.

REDDY, CAMPBELL & METSON,

Attorneys for Petitioner.

Connecticut Mutual Life Insurance Company.

JAMES L. FOGG,

General Agent.

STATE OF CALIFORNIA, }
 City and County of San Francisco, } ss.

I, W. H. Metson, being duly sworn, do say, that I am a member of the firm of Reddy, Campbell & Metson, the attorneys for the petitioner in the above-enti-

ted cause; that I have read the foregoing petition, and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

Subscribed by the said W. H. Metson, and by him sworn to before me, this 17th day of January, 1893.

W. H. METSON.

(Seal)

THOS. E. HAVEN,

Notary Public in and for the City and County of San Francisco, California.

In the Superior Court of the City and County of San Francisco, State of California.

NANNIE S. McWHIRTER,

Plaintiff.)

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Defendant.)

Bond for Removal.

KNOW ALL MEN BY THESE PRESENTS, That we, viz., said defendant, The Connecticut Mutual Life Insurance Company, a corporation under the laws of the State of Connecticut, and Geo. D. Gray of Oakland, State of California, and A. K. P. Harmon, Jr. of Oakland, State of California, as sureties, are held and firmly bound unto the plaintiff in the penal sum of \$500.00 for the payment whereof, well and truly to be made to the said plaintiff, Nannie McWhirter, her heirs, representatives and assigns, we bind ourselves, our

heirs, representatives and assigns, jointly and severally by these presents, upon condition nevertheless, that whereas the said defendant, the Connecticut Mutual Life Insurance Company, a corporation, has petitioned the Superior Court of, in and for the City and County of San Francisco, State of California, for the removal of a certain cause, therein pending, wherein said Nannie S. McWhirter is plaintiff and the said Connecticut Mutual Life Insurance Company, a corporation, is defendant, to the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

Now if the petitioner aforesaid shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in the said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if the said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof, on this 17th day of January, 1893, the said Connecticut Mutual Life Insurance Company, caused its corporate name and seal to be affixed by James L. Fogg, General Agent, and the said sureties have hereunto set their hands and affixed their seals.

CONNECTICUT MUTUAL LIFE INS. CO..

By James L. Fogg, Gen'l Agent.

GEO. D. GRAY, (Seal.)

A. K. P. HARMON, JR. (Seal.)

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

Geo. D. Gray and A. K. P. Harmon, Jr., being severally duly sworn, each for himself, deposes and says: That he is one of the sureties mentioned in the above undertaking, that he is a resident and freeholder in the said State of California, and is worth the sum in the said undertaking mentioned as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEO. D. GRAY.

A. K. P. HARMON, Jr.

Subscribed and sworn to before me, this 18th day of January, 1893.

(Seal).

THOS. E. HAVEN,

Notary Public, in and for the City and County of San Francisco, State of California.

The foregoing bond is approved by me both as to form and sufficiency of sureties thereon, and amount thereof this 18th day of January, 1893.

WM. T. WALLACE,

Judge.

GEO. D. GRAY,

A. K. P. HARMON, Jr.

[Endorsed]: No. 39438. Dept. 6, Superior Court of the City and County of San Francisco, State of California. Nannie S. McWhirter, Plaintiff vs. The Connecticut Mutual Life Insurance Company, Defendant. Petition and Bond for removal of cause to U. S. Circ't Ct. and approval of bond by Judge. Filed January

18, 1893. M. C. Haley, Clerk, by Wm. T. Hawley, Deputy Clerk. Reddy, Campbell & Metson, Attorneys for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

I, M. C. Haley, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court thereof, hereby certify that the foregoing transcript is a full, true and correct copy of all the following named papers and pleadings and the endorsements thereon, now on file in my office in the case of Nannie S. McWhirter vs. The Connecticut Mutual Life Insurance Company and comprising the entire record thereof, to-wit: Complaint, Petition for removal of Cause to the United States Circuit Court, Bond for removal of Cause to the United States Circuit Court and Approval of Bond.

Witness my hand and seal of the Superior Court of the City and County of San Francisco State of California, this 2d day of February, 1893.

(Seal)

M. C. HALEY, Clerk.

By Thos. F. Egan, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

NANNIE S. McWHIRTER,	}	Demurrer.
Plaintiff.		
vs.		
THE CONNECTICUT MUTUAL LIFE IN-	}	Demurrer.
SURANCE COMPANY,		
Defendant.		

Demurrer.

And now comes the Connecticut Mutual Life Insurance Company, the defendant in the above-entitled action, and demurs to the sufficiency of the first count of the Complaint of Plaintiff, on file in said action, and for grounds of such demurrer specifies the following:

I.

That said Count of the Complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

That said Count of the Complaint does not state facts sufficient to constitute a cause of action against defendant in this: that while it affirmatively appears by said first count that the contract or policy which is alleged to have existed between defendant and the said Louis B. McWhirter, mentioned in the said first count, consisted in part of a written application for said contract or policy of insurance, the said application is not set forth in said first count, nor are the terms thereof described to any extent or at all.

III.

That said first count of the complaint does not state facts sufficient to constitute a cause of action against the defendant in this: It does not appear that the money alleged to be due to plaintiff was ever demanded of the defendant at any time after thirty days following the 1st day of December, 1892, or at any time after thirty days from the time of the notice or proof of the death of said Louis B. McWhirter, alleged in said count, or at all; and in this: that it does not appear therefrom that thirty days elapsed after said December 1st, 1892, and before the commencement of this action, or after the time of the notice or proof of the death of the said Louis B. McWhirter, alleged in said count; and in this: that no facts whatever are stated in said count, showing due notice of satisfactory evidence of the death of said Louis B. McWhirter had been given to or received by the defendant at its office in Hartford, Connecticut, prior to the 1st day of December, 1892, or at all, but only conclusions of law and opinions of the plaintiff in this behalf; and in this: that it does not appear from said first count of the Complaint that the sum of \$5,000, named in said policy of insurance, has not been paid or is unpaid, but only the allegation that the defendant has not paid the same; and in this: that it is not alleged therein, generally or at all, that the plaintiff has performed all or any of the terms and conditions of the said contract of insurance mentioned in said complaint.

IV.

That the said first count of the Complaint is uncertain in this: that it cannot be ascertained from said

first count, what are the terms of the application for insurance, mentioned therein, or whether the conditions set forth in said count as being part of said policy of insurance constituted the only conditions of said policy; and in this, that the date of the alleged notice and proof of the death of the said Louis B. McWhirter is not stated in said first count; and in this: that it cannot be ascertained therefrom, whether the sum of \$5000 alleged to be due to plaintiff has not been paid, but only an allegation that the defendant has not paid the same.

SECOND.

And the defendant demurs to the sufficiency of the second count of said Complaint and for grounds of demurrer specifies the following:

I.

That the said second count of the Complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

That said second count of the Complaint does not state facts sufficient to constitute a cause of action against defendant in this: that while it affirmatively appears by said second count that the contract or policy which is alleged to have existed between defendant and the said Louis B. McWhirter, mentioned in the said second count, consisted in part of a written application for said contract or policy of insurance, the said application is not set forth in said second count, nor are the terms thereof described to any extent or at all.

III.

That said second count of the Complaint does not state facts sufficient to constitute a cause of action against the defendant in this: it does not appear that the money alleged to be due to plaintiff was ever demanded of the defendant at any time after thirty days following the first day of December, 1892, or at any time after thirty days from the time of the notice or proof of the death of said Louis B. McWhirter, alleged in said count, or at all; and in this: that it does not appear therefrom that thirty days elapsed after said December 1st, 1892, and before the commencement of this action or after time of the notice or proof of the death of the said Louis B. McWhirter, alleged in said count; and in this: that no facts whatever are stated in said count, showing due notice or satisfactory evidence of the death of said Louis B. McWhirter, had been given to or received by the defendant at its office in Hartford, Connecticut, prior to the first day of December, 1892, or at all, but only conclusions of law and opinions of the plaintiff in this behalf; and in this: that it does not appear from said second count of the complaint that the sum of \$10,000, named in said policy of insurance has not been paid or is unpaid, but only the allegation that the defendant has not paid the same; and in this: that it is not alleged therein generally or at all, that the plaintiff has performed all or any of the terms and conditions of the said contract of insurance mentioned in said complaint.

IV.

That the said second count of the Complaint is uncertain in this: that it cannot be ascertained from said second count, what are the terms of the application for insurance, mentioned therein, or whether the conditions set forth in said count as being part of said policy of insurance constituted the only conditions of said policy; and in this: that the date of the alleged notice and proof of the death of the said Louis B. McWhirter is not stated in said second count; and in this: that it cannot be ascertained therefrom, whether the sum of \$10,000 alleged to be due to plaintiff has not been paid, but only an allegation that the defendant has not paid the same.

Wherefore, defendant prays that the said Complaint be dismissed; that the defendant do have its costs herein incurred.

J. H. BUDD, P. J. HAZEN and
REEDY, CAMPBELL & METSON,
Attorneys for Defendant.

J. C. CAMPBELL,
Of Counsel.

I hereby certify that in my opinion the foregoing demurrer of defendant to the complaint of Nannie S. McWhirter is well founded in point of law, and that I am of counsel for the defendant in said action.

J. C. CAMPBELL,
Of Counsel.

UNITED STATES OF AMERICA. }
Northern District of California. } ss.

James L. Fogg, being first duly sworn, deposes and says that he is an officer of the defendant named in the above-entitled action, to-wit, the General Agent thereof; that he has read the demurrer to the complaint of plaintiffs and knows the contents thereof, and that the same is well founded in point of law, and it not interposed for the purposes of delay.

JAS. L. FOGG.

Subscribed and sworn to before me this 13th day of February, 1893.

(Seal.)

THOS. E. HAVEN,
Notary Public.

(Due service of within demurrer admitted this 10th day of Feb., 1893.

THORNTON & MERZBACH,
THOMPSON & KING,
Attorneys for Plaintiff.

[Endorsed]: Filed, February 13, 1893. L. S. B.
Sawyer, Clerk.

*In the Circuit Court of the United States, Ninth Circuit
and Northern District of California.*

NANNIE S. McWHIRTER, }
Plaintiff, }
vs. }
THE CONNECTICUT MUTUAL LIFE }
INSURANCE COMPANY, }
Defendant. }

Answer.

And now comes the Connecticut Mutual Life Insurance Company, the defendant in the above entitled action, and without waiving any right or rights of said company secured to it by its demurrer to the complaint of plaintiff filed in the said action, but expressly insisting on each and every objection taken to the said complaint by the said demurrer, for answer to the first count of the said complaint, denies that each or any of the several answers, warranties or agreements contained in the application for insurance referred to in the said first count of the complaint were or are true, in the letter or spirit thereof or that said warranties or agreements have been performed or made good.

Denies on information and belief that the said Louis B. McWhirter did not die from any cause in the said policy named as an expected risk on the life of the said McWhirter, and denies on like information and belief that the said McWhirter dies on the 29th day of August, 1892, or at any other time, at the city of Fresno, county of Fresno, State of California, or at any other place, by being murdered or assassinated by any one whomsoever, and in this behalf the defendant alleges on its information and

belief that the said McWhirter at the time and place last aforesaid, died by self-destruction, that is to say, the said Louis B. McWhirter at the said time and place committed suicide, and that at the time of the said act said McWhirter was in no degree insane so as to destroy his responsibility for the said act, but on the contrary the said McWhirter was at the time of the said act perfectly sane and in complete possession of his senses and well aware of the nature of his said act of suicide.

And the defendant denies that due notice or satisfactory evidence of the death of the said McWhirter was delivered to or received by the defendant at its office at Hartford, Connecticut or anywhere, or at all, of the said death, prior to the first day of December, 1892, or at any other time.

II.

And for a further and separate defense to the alleged and pretended cause of action set forth in the first count of the said complaint, the defendant alleges that the policy of insurance described in the said first count of the complaint was issued by the defendant corporation to the said Louis McWhirter, named in the said first count, and accepted by the said McWhirter upon the following express condition and agreements contained in the said policy of insurance, to wit:

“ 3rd. That the following risks are not assumed by this company under this contract: Death while residing or being or from any disease contracted while residing or being outside of the Temperate Zones, or while personally engaged or employed

or from any accident or injury received while engaged or employed in making any aeronautic voyage or excursion, or in blasting, mining, or in submarine operations, or in the manufacture, handling, use, custody or transportation of highly inflammable or explosive substances, or upon service upon any ocean, sea, sound, inlet, lake or railroad, or in any military or naval service whatsoever in any time of war, whether voluntary or otherwise, or as a member of any paid fire department, without the consent of this company previously given in writing, or death in the violation of law, or in consequence thereof, or after the conviction of felony, or by self destruction except upon satisfactory proof that the insured was so far insane as to destroy his responsibility therefor, or in a state of drunkenness or from any accident or violence received while in that state, or from any disease caused by stimulants or narcotics; and if delirium tremens, or any injury to or impairment of the health be caused by them, this policy shall thereupon and thereby be wholly forfeited and terminated.

And in each and every of the foregoing cases this policy shall become and be null and void; but this company will, upon surrender and satisfactory release hereof within one year thereafter and not otherwise returned to the assured the then net reserve upon this policy, computed upon the American Tables of Mortality and three per centum compound interest, less any balance of the years premium when not all paid at the beginning of the year and any other indebtedness to this company on account of this policy.

“ 4th. That in every case in which this policy shall cease and determine or shall become and be null and

void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this company, except as hereinbefore provided.”

And the defendant alleges on his information and belief that the said Louis B. McWhirter died on the 29th day of August, 1892, in the City of Fresno, County of Fresno, State of California, from a gun-shot wound inflicted by the hand of him, the said McWhirter, upon himself with suicidal intent, and therefore defendant alleges that the said McWhirter dies from self-destruction, and in this behalf defendant alleges that the said McWhirter dies from a risk not assumed but expressly excepted by the defendant in and the said policy of insurance, to wit, from self-destruction or suicide.

And the defendant further alleges that at the time of the aforesaid act of self-destruction or suicide the said McWhirter was perfectly sane, and in the complete possession of his senses and well aware of the nature of his said act.

And the defendant alleges that by reason of the premises the said policy of insurance became and was wholly null and void, and the premium paid by the said McWhirter as alleged in the said first count of the complaint became and were forfeited to the defendant. That no proof whatever has been offered or made by any one that the said McWhirter when he committed the said act of self-destruction was in any manner insane so as to be irresponsible for his said act, nor could any such proofs be made because of the aforesaid facts hereinbefore alleged.

III.

And for a further and separate defense to the alleged and pretended cause of action set forth in the said first count of the said complaint, the defendant alleges.

That the said Louis B. McWhirter mentioned in said first count of the complaint, on the 19th day of November, 1891, made an application in writing to the defendant corporation, which said application is mentioned in the said first count of the complaint for a policy of insurance in said corporation in the sum of \$5,000, and that subsequently, to-wit, on the 18th day of December, 1891, a policy of insurance in the said sum of \$5,000 was issued by the defendant to the said McWhirter, and is the policy of insurance referred to in the said first count of the complaint. That by the terms of said policy of insurance the said application was made a part thereof, and that said application was and is in the words and figures following, to-wit:

Every question must be fully answered above the warranty clause, every name legibly written, and every needed signature properly attached and witnessed. Every incomplete application will be returned.

APPLICATION FOR INSURANCE IN

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
OF HARTFORD, CONNECTICUT, which is the basis of
and a part of the contract of insurance.

1. A. Full name of the person whose life is proposed for insurance? Louis Bransford McWhirter.

C. Occupations?
(To be stated specifically)
Present, Lawyer.
Former, same.

B. Married? Yes.

D. Residence.

Town or City, Fresno
County, Fresno State of California.
P. O. Address, Fresno

2. A. When and where were you born? On the 18th day of June 1854, at Glasgow in Ky.

B. Your age next birthday? 38 years.

3. A. How much insurance is desired? (\$5000)
Five thousand dollars.

B. What form of Policy is desired? Twenty Payment Life.

C. To whom payable in case of loss? Nannie S. McWhirter.

D. Relationship to the life proposed? Wife.

E. To whom is the policy or its cash value to be made payable in case of maturity or surrender within the lifetime of the insured? Myself.

4. A. Is it desired to pay the premium annually?
No.

In semi-annual installments? No. In quarterly installments? Yes.

(If paid in semi-annual installments, an addition of 2 per cent., and if in quarterly installments, an addition of 3 per cent. will be made to the annual premium stated in the Policy.)

B. Is it desired to make the annual premium fall due at some other date than that of the Policy?
No. If so, what date?

5. A. Is there now any insurance on your life?
No. If in this company, state the No. of Policy and Amt? No..... for \$..... No..... for \$

C. If in other Companies state (In the.....Co. for \$..... the name of each Co. or Association. (In the..... Co..... for \$..... and amount insured in each?

In the.....Co., for \$.....

In the.....Co., for \$.....

D. How much of the above insurance has been granted within one year past?

E. Has any Co. or Ass. ever declined or postponed granting or reviving insurance on your life, either for any particular amt. or any particular form? No.

If so, state the name of each Co. or Ass. how long since, and for what cause?

F. Has any opinion ever been sought from, or any statement made unto, or examination made by, or any consultation held with any person as to whether your life was insurable, except as above mentioned? Yes.

If so, what decision or opinion was then given? Granted by Connecticut Mutual one yr. ago, policy lapsed.

G. Is any application or negotiation for insurance upon your in any Co. or Ass. now pending? No.

6. A. In what quantity and how frequently do you use beer, wine, or other alcoholic stimulants? Take one drink whiskey a day.

B. To what extent do you use tobacco or other narcotics? Dont smoke at all or chew.

C. Describe particularly your past habits in both these respects. Have been very moderate in their use.

D. Have you been, or are you engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

7. A. Have you ever changed your residence, or traveled, on acct. of your health? No.

B. When, where, and for how long have you resided out of the U. S. or south of the southerly line of Tenn.? Resided in Tenn. prior to 1887 in 1875 for one year made a trip to Europe.

C. Have you ever applied for a pension? , No. If so when and on what ground? Was it granted?

E. What is the present state of your health? Good.

E. Is there now existing any disease, disorder, infirmity, weakness or malformation?.....

8. A. Have you ever had (answer yes, or no, opp. each) Difficult, Excessive, or Scanty Urination, or any disease of the Genital or Urinary Organs? No. Gravel or Calculus? No. Colic? No. Yellow Fever? No. Delirium Tremens? No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No. Aff. of Spleen? No. Abscess? No. Erysipelas? No. Cancer or any Tumor? No. Paralysis? No. Habitual Headache? No. Enlarged Vein? No. Asthma? No. Chronic Diarrhea? No. Any personal injury? No. Sunstroke? No. Syphillis? No.

Scrofula? No. Insanity? No. Dizziness or Vertigo? No. Aneurism? No. Habitual Cough? No. Piles? No. Affection of Hearing, Speech or Eyesight? Yes. Gout? No. Spitting of Blood? No. Epilepsy? No. Loss of Consciousness? No. Bronchitis? No. Shortness of Breath? No. Jaundice? No. Any discharge from the Ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of the Heart? No. Pleurisy? No. Dyspepsia? No. Affection of the Liver? No. Swelling of the feet, hands or eyelids? No.

State how frequently: the date, character, and duration of each, and its effects upon your health? Had inflammation of the ear caused by cold in 1889, lasted two weeks, no ill effects on health.

B. Have you had rheumatism? Yes. How many attacks? One, duration, two weeks, dated 1871. Was it inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath, pain in chest, or palpitation of the heart? No.

C. Have you a rupture? No. Is it single or double. Do you wear a truss, and agree to do so habitually?

D. Have you been successfully vaccinated or had smallpox? Yes—No.

A. For what else have you consulted with, or been attended by a physician or surgeon during the past ten years? Slight attack of malaria. B. Give dates, duration and affect on health. Two months ago, no affect on health. C. Name and residence of such physician and surgeon. Dr. Hopkins, Fresno. D. Of your usual physician? Have none.

		Condition of Health
10. A. Living.	Age of Each.	of Each.
Paternal grandfather.		
Paternal grandmother.		
Maternal grandfather.		
Maternal grandmother.		
Father.....	65	Good.
Mother.....	58	Good.
How many		
brothers living? One....	21	Good.
How many		
sisters living? None.		

Dead?	Age of ea.?	Cause of death of ea.?
Paternal grandfather,	85.	Old age.
Paternal grandmother,	94.	Old age.
Maternal grandfather,	60.	Phthisis.
Maternal grandmother,	84.	Pneumonia.
Father		
Mother		
How many brothers		
dead? One,	4.	Typhoid fever.
How many sisters dead? None.		

Length of sickness?	Previous health?
Paternal grandfather,	Short. Good.
Paternal grandmother,	1 week. Good.
Maternal grandfather,	3 mos. Active, but not strong.
Maternal grandmother,	5 days. Good.
Father	
Mother	
How many brothers	
dead?	3 weeks. Good.
How many sisters dead?	

B. Have any of the above, or of your uncles or aunts, ever had cancer, consumption, insanity, apoplexy, paralysis, or heart disease? Yes. Maternal grandfather; also uncle on mother's side died of consumption.

C. Who, on which side, and which diseases? Maternal grandfather and uncle mother's side of consumption.

D. Which parent do you resemble? Father.

11. Is there any fact relating to your physical condition, personal or family history, or habits which has not been stated in the answers to the foregoing question, and with which the Company ought to be made acquainted? No.

12. Have you reviewed the written answers to the above questions, and are you sure they are correct? Yes.

IT IS HEREBY DECLARED AND WARRANTED, that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this application and the several answers, warranties and agreements herein contained shall be the basis of, a part of the consideration for, and a part of the Contract of Insurance, and that no statement or declaration made to any agent, solicitor, canvasser, examiner, or any other person, and not contained in this Application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and if there be, in any of the answers herein made, any fraud, untruth, evasion, or con-

cealment of facts, then any Policy granted upon this Application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said policy for its continuance as Paid-up Insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any State relating to the lapse or forfeiture of policies of insurance.

Dated at Fresno, this 19th day of November, 1891.

Witness to the signing Hereof, J. B. Hays.

Signature of the person or persons for whose benefit the insurance is to be effected.	}	Nannie S. McWhirter by
(Write the names in full.)		Louis B. McWhirter.

Signature of the person whose life is proposed for insurance.	}	Louis Bransford
(Write the name in full.)		McWhirter.

Edition 1891.

That in said application for insurance the said McWhirter fraudulently and intentionally omitted and failed to communicate to the defendant the following facts, which facts were and are material to the said

contract of insurance, and if the same had been communicated to the defendant by said McWhirter, the defendant never would have issued to the said McWhirter the said policy of insurance, to-wit: the following facts:

The said McWhirter, prior to the making of said application for insurance in the defendant corporation had difficulties of a personal nature in the said County of Fresno, with certain persons, to the defendant unknown, and in said difficulties the said persons had threatened to murder the said McWhirter whenever and as soon as opportunity offered therefor, the said threats were believed by the said McWhirter, and that said McWhirter greatly feared by reasons of said threats and his belief therein that his, said McWhirter's life was in great and immediate danger from said persons, and acting upon such belief and solely by reason thereof the said McWhirter made the said application; and the defendant in this behalf alleges that the said McWhirter, in failing to reveal the said state of facts in relation to said difficulties and of his belief that his life was in danger thereby deliberately, knowingly, intentionally and fraudulently deceived the defendant and thereby induced the defendant to make said contract of insurance, and that by reason of the said fraud upon the defendant the said contract of insurance became, was and is wholly void and of no effect and ought not to be enforced against the defendant,—that it is expressly provided in said policy of insurance and in the said application that any concealment of facts whatever or any fraud on the part of said McWhirter did thereby make void the said policy and

thereby forfeited to the defendant all premiums paid under said policy of insurance, as fully appears by the said application, which was and is a part of said policy of insurance.

That the defendant did not know of said facts in relation to the said threats against the life of said McWhirter until after the death of the said McWhirter, to wit: until after the 29th day of August, 1892, and until after the said last named day the defendant had no means of knowing or ascertaining said facts or any of them.

And the defendant alleges that said McWhirter ought in good faith to have communicated to the defendant the said facts—that said facts were and are material to the said contract and risk and that if the same had been revealed to the defendant the defendant never would have issued the said policy of insurance to said McWhirter. That the defendant never has waived in any manner the communication of said facts, and that said facts are in no manner implied in the other facts about which communication was made by said McWhirter in said application.

IV.

And for a further and separate defense to the alleged and pretended cause of action set forth in said first count of said complaint the defendant alleges:

That said Louis B. McWhirter, mentioned in said first count of the complaint, on the 19th day of November, 1891, made an application in writing to the defendant corporation, which said application is mentioned in the said first count, for a policy of insur-

ance in said corporation in the sum of \$5,000 and that subsequently, to-wit: on the 18th day of December, 1891, a policy of insurance in the sum of \$5,000 was issued to said McWhirter, by the defendant and is the policy of insurance referred to in said first count. That by the terms of the said policy of insurance the said application was made a part thereof, and that said application was and is in the words and figures following, to-wit:

Every question must be fully answered above the warranty clause, every name legibly written, and every needed signature properly attached and witnessed. Every incomplete application will be returned.

APPLICATION FOR INSURANCE IN
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
OF HARTFORD, CONNECTICUT, which is the basis of and
a part of the Contract of Insurance.

1. A. Full Name of the person whose life is proposed for Insurance?	C. Occupations? (To be stated specifically.)
Louis Bransford McWhirter.	Present, Lawyer.
B. Married? Yes.	Former, Same.

D. Residence?	
Town or City?	Fresno.
County?	Fresno. State? California.
P. O. Address?	Fresno.

2. A. When and where were you born? On the 18th day of June, 1854; Glasgow, in Kentucky.

B. Your age next birthday? 38 years.

3. A. How much insurance is desired? (\$5,000)
 Five thousand dollars. B. What form of Policy is desired? Twenty-payment Pol.

C. To whom payable in case of loss? Nannie S. McWhirter.

D. Relationship to the life proposed? Wife.

E. To whom is the Policy or its cash value payable in case of maturity or surrender within the lifetime of the Ins.? Myself.

4. A. Is it desired to pay the premium annually? No. In semi-annual installments? No. In quarterly installments? Yes.

(If paid in semi-annual installments, an addition of 2 per cent, and if quar. installments, an addition of 3 per cent. will be made to the annual premium stated in the Policy.)

B. Is it desired to make the annual pre. fall due at some other date than that of the Policy? No. If so, what date?

5. A. Is there now any ins. on your life? No. If so in this Co. state the No. of Pol. and Amt.? No.....for \$.....No. for \$.....

C. If in other Co. state the name of each Co.) In the for \$..... of Ass. and amt. insured in ea?)
 In the for \$.....

D. How much of the above insurance has been granted within one year past?

E. Has any Co. or Ass. ever declined or postponed granting of reviving ins. on your life, either for any particular amt. or in any particular form? No.

If so, state the name of each Co. or Ass., how long since, and for what cause?

F. Has any opinion ever been sought from, or any statement made by, or any consultation ever held with, any person as to whether your life was insurable, except as above mentioned? Yes.

If so, what decision or opinion was then given? Granted by Connecticut Mutual one yr. ago, policy lapsed.

G. Is any application or negotiation for insurance upon your life in any Co. or Ass. now pending? No.

6. A. In what quantity and how frequently do you use beer, wine or other alcoholic stimulants? Take one drink whiskey a day.

B. To what extent do you use tobacco or other narcotics?

Don't smoke at all or chew.

C. Describe particularly your last habits in both these respects? Have been very moderate in their use.

D. Have you been, or are you now engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

7. A. Have you ever changed your residence, or traveled, on acct. of your health? No.

B. When, where and for how long have you resided out of the U. S., or south of the southerly line of Tenn. Resided in Tenn. prior to 1887 in 1875 for one year made a trip to Europe.

C. Have you ever applied for a pension? No. If so when and on what grounds? Was it granted?

D. What is the present state of your health?
Good.

E. Is there now existing any disease, disorder, infirmity, weakness, or malformation?

8. Have you ever had (answer Yes or No opp. ea.)
Difficult, Excessive, or Scanty Urination, or any Disease or Disorder of the Genital or Urinary Organs? No. Gravel or Calculus? No. Colic? No. Yellow Fever? No. Delirium Tremens? No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No. Affection of Spleen? No. Abscess? No. Erysipelas? No. Cancer or any Tumor? No. Paralysis? No. Habitual Headache? Enlarged Veins? No. Asthma? No. Chronic Diarrhea? No. Any Personal Injury? No. Sunstroke? No. Syphilis? No. Scrofula? No. Insanity? No. Dizziness or Vertigo? No. Aneurism? No. Habitual Cough? No. Piles? No. Affection of Hearing, Speech or Eyesight? Yes. Gout? No. No Spitting of Blood? No. Epilepsy? No. Loss of Consciousness? No. Bronchitis? No. Shortness of breath? No. Jaundice? No. Any discharge from the ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of Heart? No. Pleurisy? No. Dyspepsia? No. Affection of the Liver? No. Swelling of the feet, hands or eyelids? No.

State how frequently; the date, character, and duration of each, and its effect upon your health? Had inflammation of ear caused by cold in 1889 lasted two weeks no ill effects on health.

8. B. Have you had rheumatism? Yes. How many attacks? One. Duration? Two weeks. Dates? 1871. Was it inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath, pain in the chest, or palpitation of the heart? No.

C. Have you a rupture? No. Is it single or double? Do you wear a truss, and agree to do so habitually?

D. Have you been successfully vaccinated or had small-pox? Yes. No.

9. A. For what else have you been consulted with, or been attended by a physician or surgeon during the past ten years? Slight attack of malaria.

B. Give dates, duration, and effect on health. Two mos. ago no effect on health.

C. Name and a residence of such physician or surgeon? Dr. Hopkins, Fresno.

D. Of your usual physician? Have none.

		Condition of Health
A. Living?	Age of Each.	of Each.
Paternal grandfather		
Paternal grandmother		
Maternal grandfather		
Maternal grandmother		
Father	85	Good.
Mother	58	Good.
How many brothers living?	One. 21	Good.
How many sisters living?	None.	

Dead?	Age of Each?	Cause of Death of Each?	Length of Sickness?	Previous Health?
Paternal				
grandfather	85	Old age.	Short.	Good.
Paternal				
grandmother	94	Old age.	1 week.	Good.
Maternal				
grandfather	60	Phthisis.	3 mos.	Active, not strong.
Maternal				
grandmother	84	Pneumonia.	5 das.	Good.
Father.				
Mother.				
How many brothers				
dead?	One. 4	Typhoid fever.	3 weeks.	Good.
How many sisters dead? None.				

B. Have any of the above, or of your uncles, or aunts, ever had Cancer, Consumption, Insanity, Apoplexy, Paralysis, or Heart Disease? Yes. Maternal grandfather, also uncle on mother's side died of Consumption.

C. Who, on which side, and which disease? Maternal grandfather and uncle on mother's side of Consumption.

D. Which parent do you resemble? Father.

11. Is there any facts relating to your physical condition, personal or family history, or habits which has not been stated in the answers to the foregoing questions, and with which the Co. ought to be made acquainted? No.

12. Have you reviewed the written answers to the above question and are you sure that they are correct and true? Yes.

IT IS HEREBY DECLARED AND WARRANTED that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this Application and the several answers, warranties and agreements herein contained shall be the basis of, a part of the consideration for and a part of the Contract of Insurance, and that no statement or declaration made to any Agent, Solicitor, Canvasser, Examiner, or any other person, and not contained in this Application shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and that if there be, in any of the answers herein made, any fraud, untruth, evasion or concealment of facts, then any Policy granted upon this Application shall be null and void and all payments made thereon shall be forfeited to the Company. It is agreed that the policy hereby applied for, shall, if granted, be held to be issued and delivered at Hartford in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said policy for its continuance as Paid-up insurance, for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any state relating to the lapse or forfeiture of policies of life-insurance.

Dated at Fresno this 19th day of November, 1891.

Witness to the sign-
ing hereof..... } J. B. Hays.

Signature of the person or
persons for whose benefit
the Ins. is to be effected. } Nannie S. McWhirter, by
Louis B. McWhirter.
(Write the names in full.)

Signature of the person
whose Life is proposed for
Insurance. (Write the
name in full.) } Louis Bransford Mc-
Whirter.

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That in answer to one of the questions in said application contained, to-wit, in answer to the following questions; "Is there any fact relating to your physical condition, personal or family history or habits, which has not been stated in the answers to the foregoing questions with which the company ought to be made acquainted?" the said McWhirter replied: "No."

That in truth and in fact at the time of the said application on the 19th day of November, 1891, there were facts in the personal history of said McWhirter, which facts were well known at the date of said application to said McWhirter and unknown to the defendant with which the defendant ought to have been made acquainted by said McWhirter in the said application, to-wit: the following facts:

That said McWhirter prior to the making of the said application for insurance in the defendant corporation had difficulties of a personal nature, in said Fresno

County, with certain persons to the defendant unknown, and in said difficulties said persons had threatened to murder the said McWhirter whenever and as soon as opportunity offered therefor and that the said threats were believed by the said McWhirter and the said McWhirter greatly feared by reason of said threats and his belief therein, that his life was in danger as the defendant is informed and believes, and action upon such belief and fear and solely by reason thereof the said Mc Whirter made the said application, without revealing the facts of such threats and of his said fear and belief therein, and the defendant alleges that in and by reason the said answer to said question in relation to the personal history of said McWhirter made an express warranty in relation to matters material to said contract of insurance and to the risk assumed by the defendants in and by the said contract of insurance, and in this behalf the defendant alleges that the said answer to said question in regard to the personal history of said McWhirter, was false and known to said McWhirter to be false and was made by said McWhirter to induce the defendant to issue said policy of insurance to him, as aforesaid, and that if the defendant had received a true answer to the said question: to-wit: if the said McWhirter had stated to the defendant the above mentioned facts in relation to the personal history of said McWhirter the defendant would never have issued said policy to said McWhirter and further in this behalf the defendant alleges that the said McWhirter in answer to the said question in regard to the facts aforesaid in the personal history of said McWhirter, deliberately, and

knowingly, intentionally and fraudulently deceived the defendant, and thereby induced the defendant to make said contract of insurance, that in so doing the said McWhirter committed a fraud against the defendant, and that thereby the said policy of insurance became and is wholly null and void, in accordance with the terms of said contract and application as above set forth, and ought not to be enforced against the defendant,—that if said McWhirter had truthfully made answer to said question and had revealed the fact of such threats, as aforesaid, and that said McWhirter was in consequence thereof in great fear of his life, the defendant would never have issued said policy of insurance described in said first count of the complaint.

That the defendant did not know of the said facts in relation to said threats against said McWhirter, until after the death of said McWhirter, on the 29th day of August, 1892, and until after said last named day the defendant had no means of knowing or ascertaining the said facts or any of them.

V.

And now comes the Connecticut Mutual Life Insurance Company, the defendant in the above-entitled action, and without waiving any right or rights of said company secured to it by its demurrer to the complaint of plaintiff filed in the said action, but expressly insisting on each and every objection taken to the said complaint by said demurrer, for answer to the second count of the said complaint, denies that each or any of the several answers, war-

ranties or agreements contained in the application of insurance referred to in the said second count of the complaint were or are true in the letter or spirit thereof or that said warranties or agreements have been performed or made good.

Denies on information and belief that the said Louis B. McWhirter did not die from any cause in the said policy named as an expected risk on the life of the said McWhirter, and denies on like information and belief that the said McWhirter died on the 29th day of August, 1892, or at any other time, at the City of Fresno, County of Fresno, State of California, or at any other place, by being murdered or assassinated by any one whomsoever,—and in this behalf the defendant alleges on its information and belief that the said McWhirter at the time and place last aforesaid, died by self-destruction, that is to say the said Louis B. McWhirter at the said time and place committed suicide, and that at the time of the said act said McWhirter was in no degree insane so as to destroy his responsibility for the said act, but on the contrary the said McWhirter was at the time of the said act perfectly sane and in the complete possession of his senses and well aware of the nature of his said act of suicide.

And the defendant denies that due notice or satisfactory evidence of the death of the said McWhirter was delivered to or received by the defendant at its office at Hartford, Connecticut, or anywhere, or at all of the said death, prior to the 1st day of December, 1892, or at any other time.

VI.

And for a further and separate defense to the alleged and pretended cause of action set forth in the second count of the said complaint, the defendant alleges that the policy of insurance described in the said second count of the complaint was issued by the defendant corporation to the said Louis B. McWhirter, named in the said second count, and accepted by the said McWhirter upon the following express conditions and agreements contained in the said policy of insurance, to-wit:

“3rd. That the following risks are not assumed by this company under this contract: Death while residing or being from any disease contracted while residing or being outside of the Temperate Zones, or while personally engaged or employed, or from any accident or injury received while engaged or employed in making any aeronautic voyage or excursion, or in blasting, mining or in submarine operations, or in the manufacture of highly inflammable or explosive substances, or upon service upon any ocean, sea, sound, inlet, lake or railroad, or in any military or naval service whatsoever in any time of war, whether voluntary or otherwise, or as a member of any paid fire department, without the consent of this company previously given in writing, or death in the violation of law, or in consequence thereof, or after the conviction of felony, or by self-destruction except upon satisfactory proof that the insured was so far insane as to destroy his responsibility therefor, or in a state of drunkenness, or from any accident or violence received while in that state, or from any disease caused by stimulants or nar-

coties; and if delirium tremens, or any injury to or impairment of the health be caused by them, this policy shall thereupon and thereby be wholly forfeited and terminated.

And in each and every of the foregoing cases this policy shall become and be null and void: but this company will upon surrender and satisfactory release hereof within one year thereafter and not otherwise, return to the assured the then net reserve upon this policy, computed upon the American Tables of Mortality and three per centum compound interest, less any balance of the years premium when not all paid at the beginning of the year and any other indebtedness to this company on account of this policy.

4th. That in every case in which this policy shall cease and determine or shall become and be null and void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this company, except as hereinbefore provided."

And the defendant alleges on its information and belief that the said Louis B. McWhirter died on the 29th day of August, 1892, in the City of Fresno, County of Fresno, State of California, from a gunshot wound inflicted by the hand of him, the said McWhirter, upon himself with suicidal intent, and therefore defendant alleges that the said McWhirter died from self destruction, and in this behalf defendant alleges that the said McWhirter died from a risk not assumed but expressly excepted by the defendant in and the said policy of insurance, to wit: from self destruction or suicide.

And the defendant further alleges that at the same time of the aforesaid act of self-destruction or suicide the said McWhirter was perfectly sane and in the complete possession of his senses and well aware of the nature of his said act.

And the defendant alleges that by reason of the premises the said policy of insurance became and was wholly null and void, and the premiums paid by the said McWhirter as alleged in the said second count of the complaint became and were forfeited to the defendant. That no proof whatever has been offered or made by any one that the said McWhirter when he committed the said act of self-destruction was in any manner insane or as to be irresponsible for his said act, nor could any such proofs be made because of the aforesaid facts hereinbefore alleged.

VII.

And for further and separate defense to the alleged and pretended cause of action set forth in the second count of the said complaint the defendant alleges:

That the said Louis B. McWhirter mentioned in said second count of the complaint on the 7th day of March, 1892, made an application in writing to the defendant corporation, which said application is mentioned in the said second count of the complaint for a policy of insurance in said corporation in the sum of \$10,000 and that subsequently, to-wit: on the 15th day of March, 1892, a policy of insurance in the said sum of \$10,000 was issued by the defendant to the said McWhirter, and is the policy of insurance referred to in the said second count of the complaint.

That by the terms of said policy of insurance the said application was made a part thereof and that said application was and is in the words and figures following, to-wit:

Every question must be fully answered above the warranty clause, every name legibly written, and every needed signature properly attached and witnessed; every incomplete application will be returned.

APPLICATION FOR INSURANCE IN

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, OF HARTFORD, CONNECTICUT, which is the basis of and a part of the Contract of Insurance.

1. A. Full Name of the Person whose life is proposed for Insurance?	C. Occupations? (To be stated specifically.)
Louis B. McWhirter	Present, Lawyer
B. Married? Yes.	Former, Same.

	D. Residence?	
Town or City	Fresno	
County,	Fresno,	State, California.
P. O. Address,	Fresno.	

2. A. When and where were you born? On the 18th day of June, 1854, at Glasgow, Ky.

B. Your age next birthday? 38 yrs.

3. A. How much insurance is desired. \$10,000 (Ten Thousand Dollars). B. What form of Policy is desired? Ordinary Life. C. To whom payable in case of loss? Nannie S. McWhirter.

D. Relationship to the life proposed? Wife.

E. To whom is the policy or its cash value to be made payable in case of maturity or surrender within the lifetime of the Insured? Myself.

4. A. Is it desired to pay the premium annually? No. In semi-annual installments? Yes. In quarterly installments? No. (If paid in semi-annual installments an addition of 2 per cent., and if in quarterly installments an addition of 3 per cent. will be made to the annual premium stated in the Policy.)

B. Is it desired to make the annual premium fall due at some other date than that of the policy? Yes. If so, what date? December 1st, 1892.

5. A. Is there now any insurance on your life? No.

B. If in this Co., state the No. of Policy and amt.? No..... for \$.....

C. If in other Co., state the name of each Co.? of Ass. and amt. insured in each?

D. How much of the above insurance has been granted within one year past?

E. Has any other Co. or Ass. ever declined or postponed granting or reviving insurance in your life, either for any particular amt. or any particular form? No. If so, state the name of each Co. or Ass., how long since, and for what cause?

F. Has any opinion ever been sought from, or any statement made to, examination made by, or any consultation ever held with, any person as to whether your life was insurable, except as above mentioned? Yes. If so, what decision or opinion was then

given? Granted by Connecticut Mutual one year ago; policy lapsed.

G. Is any application or negotiation for insurance upon your life in any Co. or Ass. now pending? No.

6. A. In what quantity and how frequently do you use beer, wine, or other alcoholic stimulants? Take one drink whiskey a day.

B. To what extent do you use tobacco or other narcotics? Don't smoke at all or chew.

C. Describe particularly your past habits in both these respects? Have been very moderate in their use prior to 1887, made a trip to Europe in 1875 for one year.

D. Have you been, or are you now engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

7. A. Have you ever changed your residence, or traveled, on acct, of your health? No.

B. When, where, and for how long have you resided out of the U. S., or south of the southerly line of Tenn? Resided in Tenn.

C. Have you ever applied for a pension? No. If so, when and on what grounds? Was it granted?

D. What is the present state of your health? Good.

E. Is there now any existing disease, disorder, infirmity, weakness or malformation?

8. A. Have you ever had (Answer Yes or No opp. ea.) Difficult, Excessive, or Scanty Urination, or any Disease or Disorder of the Genital or Urinary Organs? No. Gravel or Calculus? No. Colic? No. Yellow Fever? No. Delirium Tremens?

No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No. Affection of Spleen? No. Abscess? No. Erysipelas? No. Cancer or Tumor? No. Paralysis? No. Habitual Headache? No. Enlarged Veins? No. Asthma? No. Chronic Diarrhœa? No. Any personal injury? No. Sunstroke? No. Syphilis? No. Scrofula? No. Insanity? No. Dizziness or vertigo? No. Aneurism? No. Habitual cough? No. Piles? No. Affection of hearing, speech or eyesight? Yes. Gout? No. Spitting of blood? No. Epilepsy? No. Loss of consciousness? No. Bronchitis? No. Shortness of breath? No. Jaundice? No. Any discharge from the Ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of the Heart? No. Pleurisy? No. Dyspepsia? No. Affection of the Liver? No. Swelling of the Feet, Hands or Eyelids? No. State how frequently: the date, character, and duration of each, and its effect upon your health? Had inflammation of ear caused by cold in 1889 lasted two weeks, no ill effects on health.

B. Have you had rheumatism? Yes. How many attacks? One. Duration? Two weeks. Dated? 1871. Was it inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath; pain in chest, or palpitation of the heart? No.

C. Have you a rupture? No. Is it single or double? Do you wear a truss, and agree to do so habitually?

D. Have you been successfully vaccinated or had smallpox? Yes—No.

9. A. For what else have you consulted with, or been attended by, a Physician or Surgeon during the past ten yrs? Slight attack of malaria.

B. Give dates, duration and effect on health? Two months ago no effect on health.

C. Name and residence of your physician or surgeon? Dr. Hopkins, Fresno.

D. Of your usual physician? Have none.

10. A. Living? Age of each?		Condition of health of each?		
Paternal grandfather				
Paternal grandmother				
Maternal grandfather				
Maternal grandmother				
Father,	65			Good
Mother,	58			Good
How many brothers living?				
One.	21			Good
How many sisters living? None				
Dead?	Age of ea.?	Cause of death?	Length of sickness?	Previous Health?
Paternal grand-				
father,	85	Old age	Short	Good
Maternal grand-				
mother,	94	Old age	1 wk.	Good
Maternal grand-				
father,	60	Phthisis	3 mos.	Active, not strong
Maternal grand-				
mother	84	Pneumonia	5 das.	Good
Father				
Mother				
How many bro-				
thers dead?				
One	4	Typhoid fever	3 wks.	Good
How many sisters dead? None.				

B. Have any of the above, or of your uncles or aunts, ever had cancer, consumption, insanity, apoplexy, paralysis or heart disease? Yes; maternal grandfather; also uncle on mother's side died of consumption.

C. Who, on which side, and which diseases? Maternal grandfather and uncle on mother's side, of consumption.

D. Which parent do you resemble? Father.

11. Is there any fact relating to your physical condition, personal or family history, or habits, which have not been stated in the answers to the foregoing questions, and with which the Company ought to be made acquainted? No.

12. Have you reviewed the written answers to the above questions, and are you sure that they are correct and true? Yes.

IT IS HEREBY DECLARED AND WARRANTED, that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this Application and the several answers, warranties and agreements herein contained shall be the basis of, a part of the consideration for, and a part of the Contract of Insurance, and that no statement or declaration made to any Agent, Solicitor, Canvasser, Examiner, or any other person, and not contained in this Application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and that if there be,

in any of the answers herein made, any fraud, untruth, evasion, or concealment of facts, then any Policy granted upon this Application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the Policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and it shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said policy for its continuance as Paid-up Insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any state relating to the lapse or forfeiture of policies of life insurance.

Dated at Fresno this 7th day of March, 1892.

Witness to the signing hereof,

J. B. HAYS.

Signature of the person or persons for whose benefit the insurance is to be effected. (Write the names in full.)	}	Nannie S. McWhirter by Louis B. McWhirter.
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Signature of the person whose life is proposed for Insurance (Write the name in full.)	}	Louis B. McWhirter.
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That the said application for insurance the said McWhirter fraudulently and intentionally omitted and failed to communicate to the defendant the following facts, which facts were and are material to the said contract of insurance and if the same had been communicated to the defendant by said McWhirter the defendant never would have issued to the said McWhirter the policy of insurance, to-wit: the following facts:

The said McWhirter immediately prior to the making of said application for insurance in the defendant corporation had difficulties of a personal nature in the said County of Fresno, with certain persons, to the defendant unknown, and in said difficulties the said persons had threatened to murder the said McWhirter whenever and as soon as opportunity offered therefor, that said threats were believed by the said McWhirter and said McWhirter greatly feared by reasons of said threats and his belief therein that his, McWhirter's, life was in great and immediate danger from said persons, and acting upon such belief and solely by reason thereof the said McWhirter made the said application; and the defendant in this behalf alleges that the said McWhirter, in failing to reveal the said state of facts in relation to said difficulties and of his belief that his life was in danger thereby deliberately, knowingly, intentionally and fraudulently deceived the defendant and thereby induced the defendant to make said contract of insurance, and that by reason of the said fraud upon the defendant the said contract of insurance became, was and is wholly void and of no effect and ought not to be enforced

against the defendant,—that it is expressly provided in said policy of insurance and in the said application that any concealment of facts whatever or any fraud on the part of McWhirter did thereby make void the said policy thereby forfeited to the defendant all the premiums paid under said policy of insurance, as fully appears by the said application, which was and is a part of said policy of insurance.

That the defendant did not know of said facts in relation to the said threats against the life of said McWhirter until after the death of the said McWhirter, to-wit: Until after the 29th day of August, 1892, and until after the said last-named day the defendant had no means of knowing or ascertaining said facts or any of them.

And the defendant alleges that said McWhirter ought in good faith to have communicated to the defendant the said facts; that said facts were and are material to the said contract and risk, and that if the same had been revealed to the defendant the defendant never would have issued the said policy of insurance to said McWhirter. That the defendant never has waived in any manner the communication of said facts and that said facts are in no manner implied in the other facts about which communication was made by said McWhirter in said application.

VIII.

And for a further and separate defense to the alleged and pretended cause of action set forth in the said second count of said complaint the defendant alleges:

That said Louis B. McWhirter, mentioned in the said second count of the complaint, on the 7th day of March, 1892, made an application in writing to the defendant corporation, which said application is mentioned in said second count, for a policy of insurance in said corporation in the sum of \$10,000 and that subsequently; to-wit: on the 15th day of March, 1892, a policy of insurance in the sum of \$10,000 was issued to said McWhirter by the defendant and is the policy of insurance referred to in the said second count. That by the terms of said policy of insurance the said application was made a part thereof, and that said application was and is in the words and figures following, to-wit:

Every question must be fully answered above the warranty clause, every name legibly written, and every needed signature properly attached and witnessed. Every incomplete application will be returned.

APPLICATION FOR INSURANCE IN

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, OF HARTFORD, CONNECTICUT, which is the basis of and a part of the Contract for Insurance.

<p>1. A. A full name of the person whose life is proposed for Ins. Louis B. Mc Whirter. B. Married? Yes.</p>	<p>C. Occupations? (To be stated specifically) Present, Lawyer Former, Same.</p>
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	D. Residence?	
Town or City	Fresno	
County	Fresno	State, California.
P. O. Address	Fresno	

2. A. When and where were you born? On the 18th day of June, 1854, Glasgow, in Ky.

B. Your age next birthday? 38 yrs.

3. A. How much insurance is desired? \$10,000 (Ten Thousand Dollars.) B. What form of Policy is desired? Ordinary life.

C. To whom payable in case of loss? Nannie S. McWhirter.

D. Relationship to the life proposed? Wife.

E. To whom is the Policy or its cash value to be made payable in case of maturity or surrender within the lifetime of the Insured? Myself.

4. A. Is it desired to pay the premium annually? No. In semi-annual installments? Yes. In quarterly installments? No. (If paid in semi-annual installments, an addition of 2 per cent., and if in quarterly installments, an addition of 3 per cent. will be made to the annual premium stated in the Policy).

B. Is it desired to make the annual premium fall due at some other date than that of the Policy? Yes. If so, what date? December 1st, 1892.

5. A. Is there now any insurance on your life? No.

B. If in this Co. state the No. of the Policy and amt?

No..... for \$..... No.....for \$.....

C. If in other Co. state the name of each Co. or Ass. and amt. insured in each? In the..... for \$..... In the..... for \$.....

D. How much of the above insurance has been granted within one year past?

E. Has any Co. or Ass. ever declined or postponed granting or reviving insurance on your life, either for any particular amt. or any particular form? No. If so, state the name of each Co. or Ass., how long since, and for what cause.

F. Has any opinion ever been sought from, or any statement made to, or examination made by, or any consultation held with, any person as to whether your life was insurable, except as above mentioned? Yes. If so, what decision or opinion was then given? Granted by Connecticut Mutual one year ago policy lapsed.

G. Is any application or negotiation for insurance upon your life in any company or association now pending? No.

6. A. In what quantity and how frequently do you use beer, wine, or other alcoholic stimulants? Take one drink whiskey a day.

B. To what extent do you use tobacco or other narcotics? Don't smoke at all or chew.

C. Describe particularly your past habits in both these respects. Have been very moderate in their use prior to 1887 made a trip to Europe in 1875 for one year.

D. Have you been, or are you now engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

7. A. Have you ever changed your residence, or traveled on account of your health? No.

B. When, where and for how long have you resided out of the U. S., or South of the southerly line of Tennessee? Resided in Tenn.

C. Have you applied for a pension? No. If so when and on what grounds? Was it granted?

D. What is the present state of your health? Good.

E. Is there now any existing disease, disorder, infirmity, weakness or malformation?

8. A. Have you ever had (Answer · Yes or No opposite each) Difficult, Excessive, or scanty Urination, or any disease or disorder, infirmity, of the Genital or Urinary Organs? No. Gravel or Calculus? No. Colic? No. Yellow Fever? No. Delirium Tremens? No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No. Affection of Spleen? No. Abscess? No. Erysipelas? No. Cancer or any Tumor? No. Paralysis? No. Habitual Headache? No. Enlarged Veins? No. Asthma? No. Chronic Diarrhoea? No. Any personal injury? No. Sunstroke? No. Syphilis? No. Scrofula? No. Insanity? No. Dizziness or Vertigo? No. Aneurism? No. Habitual Cough? No. Piles? No. Affection of Hearing, Speech, or Eyesight? Yes. Gout? No. Spitting of Blood? No. Epilepsy? No. Loss of Consciousness? No. Bronchitis? No. Shortness of Breath? No. Jaundice? No. Any discharge from the ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of the Heart? No. Pleurisy? No. Affection of Liver? No. Swelling of feet or hands or eyelids? No.

State how frequently, the date, character and duration of each, and its effect upon your health? Had inflammation of the ear caused by cold in 1889, lasted two weeks, no ill effect on health.

B. Have you had Rheumatism? Yes How many attacks? One. Duration? Two weeks. Dates? In 1871. Was it Inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath, pain in chest, or palpitation of the heart? No.

C. Have you a rupture? No. Is it single or double?

Do you wear a truss, and agree to do so habitually?

D. Have you been successfully vaccinated or had small-pox? Yes—No.

9. A. For what else have you consulted with, or been attended by, a physician or surgeon during the past ten years? Slight attack of malaria.

B. Give dates, duration, and effect on health. Two months ago; no effect on health.

C. Name and residence of such physician or surgeon. Dr. Hopkins, Fresno.

D. Of your usual physician? Have none.

10. A. Living?	Age of Each?	Condition of Health of Each?
Paternal grandfather		
Paternal grandmother		
Maternal grandfather		
Maternal grandmother		
Father	65	Good
Mother	65	Good
How many brothers living? One	21	Good
How many sisters living? None		

Dead?	Cause of Death of Each?	Length of Sickness?	Age?	Previous Health?
Paternal grandfather	Old age.	Short.	85	Good.
Paternal grandmother	Old age.	1 week.	94	Good.
Maternal grandfather	Phthisis.	3 mos.	60	Active, not strong.
Maternal grandmother	Pneumonia.	5 days.		Good.
Father				
Mother				
How many brothers dead? One	Typhoid fever.	3 weeks.	4	Good.
How many sisters dead?	None.			

10. B. Have any of the above, or of your uncles or aunts, ever had Cancer, Consumption, Insanity, Apoplexy, Paralysis, or Heart Disease? Yes. Maternal grandfather, also uncle on mother's side died of Consumption.

C. Who, on which side, and which diseases? Maternal grandfather and uncle on mother's side of Consumption.

D. Which parent do you resemble? Father.

11. A. Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted? No.

12. Have you reviewed the written answers to the above questions, and are you sure they are correct and true? Yes.

IT IS HEREBY DECLARED AND WARRANTED, that the above are fair and true answers in all respects to the foregoing questions; and it is agreed by the undersigned that this Application and the several answers, warranties, agreements, herein contained shall be the basis of, a part of the consideration for, and a part of the Contract of Insurance, and that no statement or declaration made to any Agent, Solicitor, Examiner, or any other person, and not contained in this Application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the company, or as charging it with any liability by reason thereof; and if there be, in answers herein made, any fraud, untruth, evasion, or concealment of facts, then any Policy granted upon this Application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said policy for its continuance as paid-up insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any State relating to the lapse or forfeiture of policies of life insurance.

Dated at Fresno, this 7th day of March, 1892.

Witness to the signing }
 hereof, } J. B. Hays.

Signature of the person or }
 persons for whose bene- }
 fit the insurance is to be }
 effected. (Write the }
 names in full.) } Nannie S. McWhirter,
 by Louis B. McWhirter.

Signature of the person }
 whose life is proposed }
 for insurance. } Louis B. McWhirter.
 (Write the name in full.) }

Edition 1891.

That in answer to one of the questions in said application contained, to-wit: in answer to the following questions, "Is there any fact relating to your physical condition, personal or family history or habits, which has not been stated in the answers to the foregoing questions with which the company ought to be made acquainted?" the said McWhirter replied: "No."

That in truth, and in fact at the time said application, to-wit, on the 7th day of March, 1892, there were facts in the personal history of the said McWhirter, which facts were well known at the date of said application to said McWhirter and unknown to the defendant, with which the defendant ought to have been made acquainted by said McWhirter in said application, to-wit, the following facts:

The said McWhirter prior to the making of said application for insurance in the defendant corporation had difficulties of a personal nature, in said Fresno

county, with certain persons to the defendant unknown, and in said difficulties said persons had threatened to murder the said McWhirter whenever and as soon as opportunity offered therefor and that the said threats were believed by the said McWhirter, and said McWhirter greatly feared by reason of said threats and his belief therein that his life was in danger, as the defendant is informed and believes, and acting upon such belief and fear and solely by reason thereof the said McWhirter made the said application, without revealing the facts of such threats and of his said fear and belief therein—and the defendant alleges that in and by the said answer to said question in relation to the personal history of said McWhirter, the said McWhirter made an express warranty in relation to matters material to said contract of insurance and to the risk assumed by the defendants in and by the said contract of insurance, and in this behalf the defendant alleges that the said answer to said question in regard to the personal history of said McWhirter, was false and known to said McWhirter to be false and was made by said McWhirter to induce the defendant to issue said policy of insurance to him, as aforesaid, and that if the defendant had received a true answer to the said question, to wit: If the said McWhirter had stated to the defendant the above mentioned facts in relation to the personal history of said McWhirter, the defendant never would have issued said policy to said McWhirter and further in this behalf the defendant alleges that the said McWhirter, in answer to said question in regard to the facts aforesaid in the personal history of

said McWhirter, deliberately, knowingly, intentionally and fraudulently deceived the defendant, and thereby induced the defendant to make said contract of insurance, that in so doing the said McWhirter committed a fraud against the defendant and that thereby the said policy of insurance became and is wholly null and void in accordance with the terms of said contract and application as above set forth and ought not to be enforced against the defendant,—that if said McWhirter had truthfully made answer to said question and had revealed the facts of such threats as aforesaid, and that said McWhirter was in consequence thereof in great fear of his life, the defendant would never have issued said policy of insurance described in said second count of the complaint.

That the defendant did not know of the said facts in relation to said threats against said McWhirter, until after the death of said McWhirter on the 29th day of August, 1892, and until after said last named day the defendant had no means of knowing or ascertaining the said facts or any of them.

Wherefore the defendant prays that it be adjudged and decreed that the plaintiff take nothing by her said complaint, and that the policies of insurance described in the said complaint be decreed to be null and void, and that the premiums paid by said McWhirter on the same, as alleged in said complaint be declared and adjudged to be forfeited to the defendant in accordance to the terms of said policies of insurance for

costs of suit and for such other and further relief as may seem just and equitable to this Honorable Court.

JAMES H. BUDD, P. J. HAZEN and
REDDY, CAMPBELL & METSON,

Attorneys for Defendant.

J. C. CAMPBELL,

Of Counsel for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

James L. Fogg being duly sworn, deposes and says, that he is an officer and attorney of the defendant corporation, named in the above entitled action. That he has heard read the above and foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

That the defendant is absent from the State of California, to-wit: is in the State of Connecticut; that affiant resides in the County of Alameda, State of California, and that the facts stated in the said answer are within the knowledge of affiant—that for the foregoing reason affiant makes this affidavit and verification for and in behalf of the said defendant.

Subscribed and sworn to before me this 1st day of July, 1893.

JAMES L. FOGG.

(Seal)

CHARLES H. PHILLIPS,
Notary Public.

Due service of within answer by copy admitted 3rd day of July, 1893.

THORNTON & MERZBACH,
Attorneys for Plaintiff.

[Endorsed]: Filed July 3rd, 1893. W. J. Costigan,
Clerk.

*United States of America, Circuit Court of the United
States, Ninth Judicial Circuit, Northern District
of California.*

NANNIE S. McWHIRTER,	} Plaintiff,	} No. 11,762.
vs.		
THE CONNECTICUT MUTUAL LIFE IN- SURANCE COMPANY,	} Defendant.	

Verdict of Jury.

We the jury find for the plaintiff in the sum of Sixteen thousand one hundred thirty seven and 50-100 (\$16,137 50-100) dollars.

Foreman,
J. J. VASCONCELLOS.

[Endorsed]: Filed February 9th, 1894. W. J. Costigan, Clerk.

Order on Demurrer.

At a stated term, to-wit: The February term, A. D. 1893, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court

Room in the City and County of San Francisco, on Monday, the 29th day of May, in the year of our Lord One thousand eight hundred and ninety-three.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

NANNIE S. McWHIRTER,

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

No. 11,762.

The demurrer to the Complaint herein heretofore argued and submitted to the Court for consideration and decision, having been duly considered, it is ordered that said demurrer be and the same hereby is overruled, with leave to the defendant to answer in twenty days.

[Endorsed]: Filed Feb'y 10th, 1894. W. J. Costigan, Clerk.

United States of America, Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

NANNIE S. McWHIRTER,

Plaintiff,

vs.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Defendant.

No. 11762.

Judgment.

This cause came on regularly for trial. The said parties appeared by their attorneys, Crittenden Thornton and W. P. Thompson, Esqs., appearing for plaintiff

and J. C. Campbell and J. H. Budd, Esqs., for defendant. A jury of twelve persons was regularly impanelled and sworn to try this cause. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, argument of Counsel and instructions of the Court, the jury retired to deliberate upon a verdict, and subsequently returned into Court, and being called all answered their names and presented the following verdict:

United States of America, Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

NANNIE S. McWHIRTER,	} Plaintiff,	} No. 11762.
vs.		
THE CONNECTICUT MUTUAL LIFE	} Defendant.	
INSURANCE COMPANY,		

We, the jury find for the plaintiff in the sum of sixteen thousand one hundred thirty seven and 50-100 (\$16137 50-100) dollars.

J. J. VASCONCELLAS,
Foreman.

Wherefore, by virtue of the law and by reason of the premises, it is ordered, adjudged and decreed, that Nannie S. McWhirter, plaintiff aforesaid have, and recover from said defendant "The Connecticut Mutual Life Insurance Company" the sum of sixteen thousand one hundred and thirty-seven and 50-100 (\$16,137

50-100) dollars, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$.

Entered Feby. 10th, 1894.

W. J. COSTIGAN,
Clerk.

I hereby certify the foregoing to be a full, true and correct copy of the original judgment entered in the said cause.

Attest my hand and the seal of said Circuit Court this 10th day of Feby. 1894.

(Seal.)

W. J. COSTIGAN,
Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

N. S. McWHIRTER,

vs.

THE CONNECTICUT MUTUAL LIFE
INSURANCE COMPANY.

} No. 11,762.

I, W. J. Costigan, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 10th day of February, 1894.

(Seal.)

W. J. COSTIGAN,
Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

NANNIE S. McWHIRTER,	}
Plaintiff,	
vs.	}
THE CONNECTICUT MUTUAL LIFE	
INSURANCE COMPANY,	
Defendant.	}

Notice of Motion for New Trial.

To the Plaintiff above named and to Messrs. Thornton & Merzbach and Thompson & King, her attorneys:

You will please take notice that the defendant above named intends to move the Court to set aside and vacate the verdict of the jury and grant a new trial herein upon the following grounds:

I.

Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

II.

Misconduct of the jury.

III.

Newly discovered evidence material for the defendant, which it could not with reasonable diligence have discovered and produced at the trial.

IV.

Insufficiency of the evidence to justify the verdict.

V.

That the verdict is against law.

VI.

Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon a Bill of Exceptions to be hereafter prepared and settled, upon affidavits and upon the minutes of the Court.

And you are further notified that said motion will be made on the 26th day of February, 1894, at the opening of Court on that day, or as soon thereafter as counsel can be heard, or if the Bill of Exceptions be not settled on said day, said defendant will apply to the Court to continue said motion until said Bill of Exceptions be settled; and if said motion cannot be heard on the 26th day of February, 1894, said motion will be made on the next succeeding motion day at which it can be heard and notice thereof will be given.

JAMES H. BUDD,
REDDY, CAMPBELL & METSON,
Attorneys for Defendant.

Due service of within Notice admitted this 17th day of February, 1894.

THORNTON & MERZBACH,
THOMPSON & KING,
Attorneys for Plaintiff.

[Endorsed]: Filed February 19th, 1894. W. J. Costigan, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

Hon. W. B. GILBERT, Judge.

NANNIE S. McWHIRTER,)
Plaintiff,)
vs.)
CONNECTICUT MUTUAL LIFE INSUR-)
ANCE COMPANY,)
Defendant.)

Draft of a Bill of Exceptions.

Be it remembered that this cause came on regularly for trial before the court and a jury on the 23rd day of January, 1893, the plaintiff appearing by her attorneys, W. P. Thompson, Esq. and Messrs. Thornton & Merzbach, and the defendant appearing by its attorneys, James H. Budd, Esq., and Messrs. Reddy, Campbell & Metson, and to maintain the issues on its part, defendant offered the following evidence:

Mr. Campbell—If your honor please we will offer in evidence the policies and applications, as follows:

No. 197, 244.

Rated Age 37.

EXHIBIT No. 1.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF
HARTFORD, CONN.

IN CONSIDERATION of the application for this insurance, which is the basis of and a part of this contract, and a copy whereof is hereunto annexed, and of the several answers, warranties and agreements therein contained, and of the annual premium of One hundred and eighty six 50-100 to be paid to them

on the eighteenth day of December, 1891, and on or before the same date in every year until twenty annual premiums shall have been paid,

DO HEREBY INSURE THE LIFE OF

Louis B. McWhirter (the insured), of Fresno, County of Fresno, State of California, for the term of his natural life. In the sum of Five thousand dollars, to be paid to Nannie S. McWhirter (the Assured), wife of the said Insured, for her sole use and benefit, or, in case of her decease before payment, to his children, or their descendants, if any survive, or to their guardians if under age.) or, if none, to his executors, administrators or assigns, within thirty days after due notice and satisfactory evidence of the death of the said Insured while this Contract is in full force and effect shall have been received at the office of said Company at Hartford, Conn., less any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this Company on account of this policy: And, if, after the payment, as above, of the number of annual premiums required by the Table of Paid-up Insurance printed hereon and hereby made a part of this contract, any subsequent premium or installment or premium be not paid when due, said Company do thereupon and thereafter and upon the same considerations hereinbefore set forth, but without further payment of premiums, insure said life for said term but only in a sum to be ascertained by said table, and to be payable as above provided: AND, at the end of ten years from the date above written, or at the end of

each period of five years thereafter, this Policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this Company will pay to the person or persons thereunto designated in the aforesaid application a Cash Value therefor, to be ascertained by the Table of Cash Values printed hereon and hereby made a part of this Contract, but only upon surrender and release hereof by such person or persons within thirty days after the end of such period; AND any and every sum due under this Policy shall be payable only at the office of said Company in Hartford, Conn., and upon surrender and satisfactory release hereof:

SUBJECT TO THE CONDITIONS and Agreements upon the second page of this Policy which are hereby referred to and made a part of this Contract.

IN WITNESS WHEREOF, the said The Connecticut Mutual Life Insurance Company have, by their President and Secretary, signed and delivered this Contract, in the City of Hartford, State of Connecticut, this Eighteenth day of December, A. D., one thousand eight hundred and ninety one.

EDWARD M. BUNCE, Secretary.

JOHN M. TAYLOR, Vice-President.

THIS POLICY is Issued and Accepted upon the following express Conditions and Agreements, referred to on the first page and made a part of this Contract:

1st. That this contract of insurance is wholly expressed and contained in this Policy and the Application therefor, and that no alteration, change, modifi-

cation, waiver or subsequent agreement whatever respecting this Policy shall be binding on said Company unless made in writing signed by the executive officers thereof; and that Agents of the Company have no power or authority to make, alter, change or modify any of the terms, conditions, or agreements of this Policy or to waive forfeitures thereof.

2d. That this Policy shall not be in force and binding on this Company until the advance premium hereon shall have been actually paid during the lifetime of the insured; and that if any subsequent Premium, or installment of Premium, on this Policy be not paid when due, then this Policy shall cease and determine and become and be null and void, except as hereinbefore provided after the payment of the requisite number of annual premiums; and that no premium on this Policy shall be considered as paid unless a receipt shall be given therefor, signed by the President or Secretary of the Company, and such receipt is the sole evidence of the authority of any Agent to receive any premium on account of this Policy; and that all Premiums or other payments on account of this Policy shall be payable at the office of the Company in Hartford, Conn., and not elsewhere; but for the convenience of the person paying the same, such receipts may be sent to any agent or correspondent of the Company for collection, and payment made to such agent or correspondent shall be held to have been made at said office of the Company.

3d. That the following risks are not assumed by this company: Death while residing or being, or from any disease contracted while residing or being, outside

the Temperate Zones, or while personally engaged or employed, or from any accident or injury received while engaged or employed, in making any aeronautic voyage or excursion, or in blasting, mining, or in any submarine operations, or in the manufacture, handling, use, custody, or transportation, of highly inflammable or explosive substances, or upon service on any ocean, sea, sound, inlet, river, lake or railroad, or in any military or naval service whatsoever in time of war, whether voluntary or otherwise, or as a member of any paid fire department without the consent of this company previously given in writing; or death in the violation of law, or in consequence thereof, or after conviction of felony, or by self-destruction except upon satisfactory proof that the insured was so far insane as to destroy his responsibility therefor, or in a state of drunkenness, or from any accident or violence received while in that state, or from any disease caused by stimulants or narcotics; and if delirium tremens, or any injury to or impairment of the health be caused by them, this policy shall thereupon and thereby be wholly forfeited and terminated.

In each and every of the foregoing cases this policy shall become and be null and void; but the company will, upon surrender and satisfactory release hereof within one year thereafter and not otherwise, return to the assured the then net reserve upon this policy, computed upon the American Table of Mortality and three per centum compound interest, less any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this company on account of this Policy.

4th. That in every case in which this Policy shall cease and determine or shall become and be null and void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this company, except as hereinbefore provided.

5th. That no assignment of this Policy shall be valid; but the company shall have power at any time, but at its own discretion, to accept a surrender and discharge of the same by the assured and the payee of the same by the assured and the payee of the cash value at the stipulated periods.

COPY OF APPLICATION FOR INSURANCE IN THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, WHICH IS THE BASIS OF AND A PART OF THE CONTRACT OF INSURANCE.

1. A. Full name of the person whose life is proposed for insurance? Louis Bransford McWhirter. B. Married? Yes. C. Occupation: (To be stated specifically). Present, Lawyer, former, same. D. Residence? Town or City, Fresno, County, Fresno, State, California, P. O. Address, Fresno.

2. When and where were you born? On the 18th day of June, 1854, at Glasgow in Kentucky. B. Your age next birthday? 38 years.

3. A. How much insurance is desired? (\$5000) five thousand dollars. B. What form of policy is desired? Twenty Payment Life. C. To whom payable in case of loss? Nannie S. McWhirter, L. B. M. D. Relationship to the life proposed? Wife. E. To whom is the policy or its cash value to be made pay-

able in case of maturity or surrender within the lifetime of the Insured? Myself.

4. A. Is it desired to pay the premium annually? No. In semi-annual installments? No. In quarterly installments? Yes. (If paid in semi-annual installments, an addition of 2 per cent., and if in quarterly installments, an addition of 3 per cent. will be made to the annual premium stated in the policy). B. Is it desired to make the annual premium fall due at some other date than that of the policy? No. If so, what date?

5. A. Is there now any insurance on your life? No. B. If in this Company, state the No. of Policy and Amount? No for \$.....
 No.....for \$.....C. If in other Companies, state the name of each Company or Association, and amount insured in each? In the Co., for \$. In the Co. for \$. In the Co. for \$. In the Co. for \$. D. How much of above insurance has been granted within one year past? . F. Has any Company or Association ever *declined* or *postponed* granting or reviving insurance on your life, either for any particular amount, or in any particular form? No. If so, state the name of each Company or Association, how long since, and for what cause? F. Has any opinion ever been sought from, or any statement made to, or examination made by, or any consultation ever had with, any person as to whether your life was insurable, except as above mentioned? Yes. If so, what

decision or opinion was then given?. Granted by Conn. Mutual one year ago; Policy lapsed. G. Is any application or negotiation for insurance upon your life in any Company or Association now pending? No.

6. A. In what quantity and how frequently do you use beer, wine, or other alcoholic stimulants? Take one drink whiskey a day. B. To what extent do you use tobacco or other narcotics? Don't smoke at all, nor chew. C. Describe particularly your past habits in both respects? Have been very moderate in their use. D. Have you been, or are you now engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

7. A. Have you ever changed your residence, or traveled on account of your health? No. B: When, where, and for how long have you resided out of the United States, or south of the southerly line of Tennessee? Resided in Tennessee prior to 1887; made a trip to Europe in 1875 for one year. C. Have you ever applied for a pension? No. If so, when and on what grounds? Was it granted? D. What is the present state of your health? Good. E. Is there now existing any disease, disorder, infirmity, weakness or malformation? No.

8. A. Have you ever had (answer Yes or No opposite each) difficult, excessive or scanty urination or any disease or disorder of the genital or urinary organs? No. Gravel or calculus? No. Colic? No. Yellow fever? No. Delirium tremens? No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No.

Affection of spleen? No. Abscess? No. Erysipelas? No. Cancer or any tumor? No. Paralysis? No. Habitual headache? No. Enlarged veins? No. Asthma? No. Chronic diarrhœa? No. Any personal injury? Sunstroke? No. Syphilis? No. Scrofula? No. Insanity? No. Distress or vertigo? No. Aneurism? No. Habitual cough? No. Piles? No. Affection of hearing, speech or eyesight? Yes. L. B. M. Gout? No. Spitting of blood? No. Epilepsy? No. Loss of consciousness? No. Bronchitis? No. Shortness of breath? No. Jaundice? No. Any discharge from the ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of the heart? No. Pleurisy? No. Dyspepsia? No. Affection of liver? No. Swelling of the feet, hands or eyelids? No. State how frequently; the date, character and duration of each, and its effect upon your health? Had inflammation of ear caused by cold in 1889, lasted two weeks; no ill effects on hearing or health. B. Have you had rheumatism? Yes. How many attacks? One. Duration? Two weeks. Dates? In 1871. Was it inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath, pain in the chest or palpitation of the heart? No. C. Have you a rupture? No. Is it single or double? . Do you wear a truss, and agree to do so habitually? No. D. Have you been successfully vaccinated or had smallpox? Yes—no.

9. A. For what else have you consulted with, or been attended by, a physician or surgeon during the the past ten years? Slight attack of malaria. B. Give dates, duration and effect on health? Two months

ago; no effect on health. C. Name and residence of such physician or surgeon? Dr. Hopkins, Fresno. Of your usual physician? Have none.

Condition of Health

10 A. Living.	Age of Each.	of Each.
Paternal grandfather		
Paternal grandmother		
Maternal grandmother		
Father	65	Good.
Mother	58	Good.
How many brothers living?	One. 21	Good.
How many sisters living?	None.	

Dead?	Age of Each?	Cause of Death of Each?	Length of Previous Sickness?	Health?
Paternal grandfather	85	Old age.	Short.	Good.
Paternal grandmother	94	Old age.	1 week.	Good.
Maternal grandfather	60	Phthisis.	3 mos.	Active but not strong.
Maternal grandmother	84	Pneumonia.	3 days.	Good.
Father				
Mother				
How many brothers dead?	One. 4	Typhoid fever.	3 weeks.	Good.
How many sisters dead?	None.			

B. Have any of the above, or any of your uncles or aunts, ever had cancer, consumption, insanity, apoplexy, paralysis or heart disease? Yes. Maternal grandfather also uncle on mother's side died of consumption. C. On which side, and which diseases? Maternal grandfather and uncle mother's side of consumption. D. Which parent do you resemble? Father.

11. Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the Company ought to be made acquainted? No.

12. Have you reviewed the written answers to the above questions, and are you sure they are correct and true? Yes.

IT IS HEREBY DECLARED AND WARRANTED that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this application and the several answers, warranties and agreements herein contained shall be the basis of, a part of the consideration for, and a part of the Contract of Insurance, and that no statement or declaration made to any Agent, Solicitor, Canvasser, Examiner, or any other person, and not contained in this Application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and that if there be, in any of the answers herein made, any fraud, untruth, evasion, or concealment of facts, then any Pol-

icy granted upon this Application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the Policy hereby applied for shall, if granted, be held to be issued and delivered at Hartlord, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said Policy for its continuance as Paid-up Insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any State relating [to the lapse or forfeiture of policies of life insurance.

Dated at Fresno this 19th day of November, 1891.

Signature of the person or persons for whose benefit the insurance is to be ef- fected. (Write the names in full.)	}	Nannie S. McWhirter, by Louis B. McWhirter.
--	---	--

Signature of the person whose life is proposed for Insurance. (Write the name in full.)	}	Louis Bransford McWhirter.
--	---	-------------------------------

Witness the signing hereof, J. B. Hays.

[Endorsed]: No. 197,244. Term of Life. Twenty Annual Premiums. The Connecticut Mutual Life Insurance Company, of Hartford, Connecticut. Sum insured, \$5,000. On the life of Louis B. McWhirter. Annual Premium, \$186.50-100. The Annual Premium on this Policy is due and payable on the Eighteenth day of December. Form 182. Ex'd by J.

OFFICE OF THE
CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Hartford, Conn., Mar. 15, 1892.

No. 198,281.

\$67.41-100.

In consideration of sixty-seven 41-100 dollars Policy No. 198,281, on the life of Louis B. McWhirter is hereby made of force and binding, subject to all the conditions thereof, until the first day of Dec. 1892.

Authority is hereby given to John B. Hays, Agt. to receive the the above stated amount, and receipt for the same hereon.

This payment is not an "Annual Premium" but is made merely to purchase temporary insurance between this date and the date on which the Annual Premium becomes due, and adds nothing to the value of the Policy in either Paid-up insurance or cash, in case of non-payment or surrender.

EDWARD M. BUNCE,
Secretary.

Received amount as above, this 15 day of March, 1892.

By J. B. HAYS, Agt.

Authority is hereby given to accept payment on my acct. of the amount herein stated as due, and to receipt for the same.

.....

EXHIBIT No. 2.

No. 198,281.

Rated Age. 38.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, OF
HARTFORD, CONN.

IN CONSIDERATION, of the application for this insurance, which is the basis of and a part of this Contract, and a copy whereof is hereunto annexed, and of the several answers, warranties and agreements therein contained, and of the annual premium of Two hundred and eighty nine 50-100 dollars to be paid to them on the First day of December, 1892, and on or before the same date in every year until twenty annual premiums shall have been paid, Do hereby insure the life of Louis B. McWhirter (the Insured), of Fresno, County of Fresno, State of California, for the term of his natural life, in the sum of Ten Thousand Dollars to be paid to Nannie S. McWhirter (the Assured) wife of the said Insured, for her sole use and benefit, or, in case of her decease before payment, to his children, or their descendants, if any survive, (Or to their guardians if under age), or, if none, to his executors, administrators, or assigns, within thirty days after due notice and satisfactory evidence of the death of the said Insured while this Contract is in full force and effect shall have been received at the office of said Company in Hartford, Conn., less any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this Company on account of this Policy; AND, if, after the payment, as above, of the number of annual premiums required by the table of paid-up insurance printed hereon and hereby made a part of this Contract, any subsequent

premium or installment premium be not paid when due, said Company do thereupon and thereafter and upon the same considerations hereinbefore set forth, but without further payment of premiums, insure said life for said term but only in a sum to be ascertained by said table, and to be payable as above provided; AND, at the end of ten years from the date above written, or at the end of each period of five years thereafter, this Policy having been in force during such entire periods for the full sum first above named as insured hereby and not otherwise, this Company will pay to the person or persons thereunto designated in the aforesaid application a cash value therefor, to be ascertained by the Table of Cash Values printed hereon and hereby made a part of this contract, but only upon surrender and release hereof by such person or persons within thirty days after the end of such period; AND, any and every sum due under this Policy shall be payable only at the office of said Company in Hartford, Conn., and upon surrender and satisfactory release hereof.

SUBJECT TO THE CONDITIONS and agreements upon the second page of this policy, which are hereby referred to and made a part of this contract.

IN WITNESS WHEREOF, the said The Connecticut Mutual Life Insurance Company have, by their President and Secretary, signed and delivered this contract in the City of Hartford, State of Connecticut, this Fifteenth day of March, A. D. One thousand eight hundred and ninety-two.

....., President.

EDWARD M. BUNCE, Secretary.

THIS POLICY is issued and accepted upon the following express conditions and agreements, referred to on the first page and made a part of this contract:

1st. That this Contract of Insurance is wholly expressed and contained in this policy, and the application therefor, and that no alteration, change, modification, waiver, or subsequent agreement whatever respecting this Policy shall be binding on said company unless made in writing, signed by the executive officers thereof; and that agents of the company have no power or authority to make, alter, change, or modify any of the terms, conditions, or agreements of this Policy, or to waive forfeitures thereof.

2nd. That this policy shall not be in force and binding on this Company until the advance Premium hereon shall have been actually paid during the lifetime of the insured; and that if any subsequent Premium, or installment of Premium, on this Policy be not paid when due, then this Policy shall cease and determine and become and be null and void, except as hereinbefore provided after the payment of the requisite number of annual premiums; and that no Premium on this Policy shall be considered as paid unless a receipt shall be given therefor, signed by the President or Secretary of the Company, and such receipt is the sole evidence of the authority of any Agent to receive any Premium on account of this Policy; and that all premiums or other payments on account of this Policy are payable at the office of the Company in Hartford, Conn., and not elsewhere; but for the convenience of the person paying the same, such receipt may be sent to any agent or correspondent of the Company for col-

lection, and payment to such agent or correspondent shall be held to have been made at said office of the Company.

3rd. That the following risks are not assumed by this Company under this Contract; Death while residing or being, or from any disease contracted while residing or being, outside the Temperate Zones, or while personally engaged or employed, or from any accident or injury received while engaged or employed, in making any aeronautic voyage or excursion, or in blasting, mining, or in any submarine operations, or in the manufacture, handling, use, custody or transportation of highly inflammable or explosive substances, or upon service on any ocean, sea, sound, inlet, river, lake or railroad, or in any military or naval service whatsoever in time of war, whether voluntary or otherwise, or as a member of any paid fire department, without the consent of the Company previously given in writing; or death in violation of law, or in consequence thereof, or after conviction of felony, or by self destruction, except upon satisfactory proof that the insured was so far insane as to destroy the responsibility therefor, or in a state of drunkenness, or from any accident or violence received while in that state, or from any disease caused by stimulants or narcotics, and if delirium tremens, or any injury to or impairment of the health be caused by them, this Policy shall thereupon and thereby be wholly forfeited and terminated.

In each and every of the foregoing cases this Policy shall become and be null and void; but the Company will, upon surrender and satisfactory release hereof

within one year thereafter and not otherwise, return to the Assured the then net reserve upon this Policy, computed upon the American Table of Mortality and three per centum compound interest, less any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this Company on account of this Policy.

4th. That in every case in which this Policy shall cease and determine and shall become and be null and void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this Company, except as hereinbefore provided.

5th. That no assignment of this Policy shall be valid; but the Company shall have power at any time, but at its own discretion, to accept a surrender and discharge of the same by the assured and the payee of the cash value at stipulated periods.

COPY OF APPLICATION FOR INSURANCE IN
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
OF HARTFORD, CONNECTICUT, which is the basis of,
and a part of the Contract of Insurance.

1. A. Full name of the person whose life is proposed for insurance? Louis Bransford McWhirter. B. Married? Yes. C. Occupations; (To be stated specifically). Present, lawyer. Former? Same. D. Residence? Town or City, Fresno, County, Fresno, State, California. P. O. Address, Fresno.

2. A. When and where were you born? On the 18th day of June, 1854, at Glasgow, in Kentucky. B. Your age next birthday? 38 years.

3. A. How much insurance is desired? (\$10,000) Ten Thousand Dollars. B. What form of policy is desired Ordinary life. C. To whom payable in case of loss? Nannie S. McWhirter. C. Relationship to the life proposed? Wife. E. To whom is the policy or its cash value to be made payable in case of maturity or surrender within the lifetime of the insured? Myself.

4. A. Is it desired to pay the premium annually? No. In semi-annual installments? Yes. In quarterly installments? No. (If paid in semi-annual installments, an addition of 2 per cent., and if in quarterly installments, an addition of 3 per cent., will be made to the annual premium stated in the policy.) B. Is it desired to make the annual premium fall due at some other date than that of the policy? Yes. If so, what date? December 1st, 1892.

5. A. Is there now any insurance on your life? Yes. B. If in this company state the No. of policy and amount? No. 197,244, for \$5,000. No..... for \$..... C. If in other companies, state the name of each company or association, and amount insured in each? In the Prov. Savings Co., for \$10,000. In the Co., for \$. In the Co., for \$. In the Co., for \$. D. How much of above insurance has been granted within one year past? All the same. E. Has any company or association ever *declined* or *postponed* granting or reviving insurance on your life, either for any particular amount, or in any particular form? No. If so, state the name of each company or association, how long

since, and for what cause? F. Has any opinion ever been sought from, or any statement made to, or examination made by, or any consultation ever had with, any person as to whether your life was insurable, except as above mentioned? No. If so, what decision or opinion was then given? G. Is any application or negotiation for insurance upon your life in any company or association now pending? No.

7. A. In what quantity and how frequently do you use beer, wine or other alcoholic stimulants? Take an average of one drink a day, whiskey mostly. B. To what extent do you use tobacco or other narcotics? Don't smoke at all. C. Describe particularly your past habits in both these respects? Have been moderate in their use. D. Have you been, or are you now engaged in, or connected with, the manufacture or sale of intoxicating drinks or liquors? No.

7. A. Have you ever changed your residence, or traveled, on account of your health? No. B. When, where, and for how long have you resided out of the United States, or south of the southerly line of Tennessee? Resided in Tennessee prior to 1887. Made a trip to Europe in 1875 for one year. C. Have you ever applied for a pension? No. If so, when, and upon what grounds? Was it granted? D. What is the present state of your health? Good. F. Is there now existing any disease, disorder, infirmity, weakness, or malformation? No.

8. A. Have you ever had (answer yes or no opposite each) difficult, excessive or scanty urination, or any disease or disorder of the genital or urinary or-

gans? No. Gravel or calculus? No. Colic? No. Yellow fever? No. Delirium tremens? No. Apoplexy? No. Neuralgia? No. Palpitation? No. Pneumonia? No. Fistula? No. Affection of spleen? No. Abscess? No. Erysipelas? No. Cancer or any tumor? No. Paralysis? No. Habitual headache? No. Enlarged veins? No. Asthma? No. Chronic diarrhœa? No. Any personal injury? No. Sun-stroke? No. Syphilis? No. Scrofula? No. Insanity? No. Distress or vertigo? No. Anuerism? No. Habitual cough? No. Piles? No. Affection of hearing, speech or eyesight? Yes. Gout? No. Spitting of blood? No. Epilepsy? No. Loss of consciousness? No. Bronchitis? No. Shortness of breath? No. Jaundice? No. Any discharge from the ear? No. Dropsy? No. Consumption? No. Fits? No. Disease of the heart? No. Pleurisy? No. Dyspepsia? No. Affection of liver? No. Swelling of the feet, hands or eyelids? No. State how frequently; the date, character, and duration of each, and its effect upon your health? Had inflammation of ear caused by cold in 1889, lasted two weeks, no ill effects on hearing or health. B. Have you had rheumatism? Yes. How many attacks? Two. Duration? Two or three days each. Dates? In 1871 or 1872. Was it inflammatory? Yes. Parts affected? Right leg. Accompanied by cough, shortness of breath, pain in the chest, or palpitation of the heart? No. C. Have you a rupture? No. Is it single or double? Do you wear a truss and agree to do so habitually? D. Have you been successfully vaccinated or had small-pox? Yes. No.

9. A. For what else have you consulted with, or been attended by a Physician or Surgeon during the past ten years? Slight attack of malaria. B. Give dates, duration, and effect on health? Six months ago, no effect on health. C. Name and residence of such Physician or Surgeon? Dr. Hopkins, Fresno. D. Of your usual Physician? Have none.

Condition of Health

10. A. Living?	Age of Each.	Condition of Health of Each.	
Paternal grandfather			
Paternal grandmother			
Maternal grandfather			
Maternal grandmother			
Father	65	Good.	
Mother	59	Good.	
How many brothers living? One.	22	Good.	
How many sisters living? None.			
Dead?	Age of Each?	Cause of Death of Each?	Length of Sickness?
Paternal grandfather	85	Old Age.	Short
Paternal grandmother	94	Old Age.	One Week.
Maternal grandfather	60	Phthisis.	3 months
Maternal grandmother	84	Pneumonia	5 days.
			Previous health.
Father			Good.
Mother			Good.
How many brothers dead?....One.	4.	Typhoid fever.	3 wks. Good.
How many sisters dead?.....None			Good.

B. Have any of the above, or your uncles or aunts, ever had cancer, consumption, insanity, apoplexy, paralysis, or heart disease? Yes; maternal grandfather, also uncle on mother's side, died of consumption. C. On which side, and which diseases? Maternal grandfather, uncle mother's side of consumption. Which parent do you resemble? Father.

11. Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted? No.

12. Have you reviewed the written answers to the above questions, and are you sure they are correct and true? Yes.

IT IS HEREBY DECLARED AND WARRANTED, that the above are in all respects fair and true answers to the foregoing questions; and it is agreed by the undersigned that this application and the several answers, warranties and agreements herein contained, shall be the basis of, a part of the consideration for, and a part of the Contract of Insurance, and that no statement or declaration made to any agent, solicitor, canvasser, examiner, or any other person, and not contained in this Application, shall be taken or considered as having been made to, or brought to the notice or knowledge of the Company, or as charging it with any liability by reason thereof; and that if there be in any of the answers herein made, any fraud, untruth, evasion or

concealment of facts, then any Policy granted upon this Application shall be null and void, and all payments made thereon shall be forfeited to the Company. It is agreed that the Policy hereby applied for shall, if granted, be held to be issued and delivered at Hartford, in the State of Connecticut, and shall be in all respects construed and determined in accordance with the laws of that State; and that the provisions in said Policy for its continuance as paid up insurance for a specified amount in case of failure to pay premiums, are and shall be in substitution for and in waiver of the rights of all parties hereto under any law of any State relating to the lapse or forfeiture of policies of life insurance.

Dated at Fresno this 7th day of March, 1892.

Signature of the person or persons for whose bene- fit the Insurance is to be effected.	}	Nannie S. McWhirter, by Louis B. McWhirter.
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(Write the names in full.)

Signature of the person whose life is proposed for insurance.	}	Louis Bransford McWhirter.
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(Write the name in full.)

Witness to the signing hereof. J. B. Hays.

CONNECTICUT MUTUAL LIFE INS. Co.,
Hartford, Conn.

Dear Sir—Mr. Hays of this place has just shown me a portion of a letter from your Dr. Shepherd in reference to my statements relative to my examinations, &c.

I was first examined by Dr. Pedlar of Fresno, in the presence of your Mr. Fogg, and afterwards by Dr. Hopkins. So far as I can remember, my statements were about the same on both occasions, and any variance is attributable to a difference in the style of language used by the two physicians. However, I do not think that either examiner quoted me correctly. I never intended to say that I averaged a drink of whiskey a day in one case, or that I used about a glass of wine or beer per day in the other case.

So far as I remember, I stated that I frequently took several drinks per day for a period of a week or month, and that there were frequently months when I did not drink anything. I also stated that I was not considered a hard drinker, and had not been *drunk* during the last five years. I consider myself a man of steady habits and as good a subject for insurance as I ever saw, and I don't want to insure in a company where there is likely to be any question about my family getting the insurance if I die. I have no doubt that upon reading of the reports of both physicians who examined me I could show more than one error, as they frequently put down what they think a man intends, rather than what he says.

Under the circumstances, unless your company can assure me *by special letter* that the *variance of statement in the two examinatinns amount to nothing*, I desire you to direct your Mr. Hays in this city to reject me.

Yours respectfully,

LOUIS B. McWHIRTER.

FORM OF ADDITIONAL STATEMENT TO PENDING
APPLICATION.

Dec. 4, 1891.

To the Secy. of the Conn. Mutual Life Ins. Co.

I herewith submit the corrections and additional statements written below, in and to my application for insurance, dated Nov. 19, 1891.

(Here insert the corrections or additional statements referring to the questions and answers in the application by numbers.)

No. 6. A. Answered "one drink whiskey a day." Take an average of about one a day. Some days take none at all and some days three or four. Have taken whiskey off and on since I was 20 years old. Do not drink to excess nor never have.

No. 7. B. Had one general attack, which lasted off and on through one winter, so far as I can remember, but I do not remember two attacks lasting two or three days each during that time. My recollection is not very clear as to dates, though I know I have not experienced a rheumatic pain in 18 years. I'm inclined to think I had the attack in 1871, possibly it was in 1872.

I agree that the above corrections shall form a part of said application, and subject to the agreements and warranties therein contained in all respects as fully and completely as if the same had been originally set forth in said application.

LOUIS B. McWHIRTER.

Due the Conn. Mu-
tual Life Ins. Co. in
No. 197,244. cash at the office at
Quarterly installment \$48.00. Hartford, Conn., Dec.
18, 1891, the quarterly installment of premium of
forty-eight 00-100 dollars, to continue Policy No. 197,-
244 on the life of Louis B. McWhirter, in force and
binding for three months from that date. Authority
is hereby given John B. Hays, Agt., to receive the
above-stated amount, and receipt for the said hereon.

Agreement contained in Policy respecting payment
of Premiums.

“ That this policy shall not be in force and binding
on this Company until the Advance Premium hereon
shall have been actually paid during the lifetime of
the Insured; and that if any subsequent Premium or
Installment of Premium, on this Policy be not paid
when due, then this policy shall cease and determine
and become and be null and void ” (except as therein
provided), “ and that no Premium on this Policy shall
be considered as paid unless a receipt shall be given
therefor, signed by the President or Secretary of the
Company; and such receipt shall be the sole evidence
of the authority of any agent to receive any premium
on account of this Policy; and that all premiums or
other payments on account of this Policy are payable
at the office of the Company in Hartford, Conn., and not
elsewhere; but for the convenience of the person pay-
ing the same, such receipt may be sent to any agent
or correspondent of the company for collection; and
payment to such agent or correspondent shall be held
to have been made at said office of the company.”

EDWARD M. BUNCE, Secretary.

Received amount as above this 18th day of Dec., 1891.

By JOHN B. HAYS,
Agent.

Due the Conn. Mutual Life Ins. Co., in cash, at the office at Hartford, Conn., March 18, 1892, the quarterly installment of premium of Forty-eight 00-100 dollars; to continue Policy No. 197,244 on the life of Louis B. McWhirter in force and binding for three months from that date. Authority is hereby given John B. Hays, Agt., to receive the above-stated amount, and receipt for the said hereon.

Agreement contained in Policy respecting payment of Premiums:

“That this policy shall not be in force and binding on this company until the advance premium hereon shall have been actually paid during the lifetime of the insured, and that if any subsequent premium or installment of premium, on this policy be not paid when due, then this policy shall cease and determine and become and be null and void” (except as therein provided) “and that no premium on this policy shall be considered as paid unless a receipt shall be given therefor, signed by the President or Secretary of the Company; and such receipt shall be the sole evidence of the authority of any agent to receive any premium on account of this Policy; and that all premiums or other payments on account of this Policy are payable at the office of the Company in Hartford, Conn., and not

elsewhere; but for the convenience of the person paying the same, such receipt may be sent to any agent or correspondent of the Company for collection; and payment to such agent or correspondent shall be held to have been made at said office of the Company."

EDWARD M. BUNCE,
Secretary.

Received amount as above this 18 day of March, 1892.

By JOHN B. HAYS,
Agent.

No. 197,244. Due the Conn. Mutual Life Ins. Co., in Quarterly installment \$48.00 cash, at the office at Hartford, Conn., June 18, 1892, the quarterly installment of premium of Forty-eight 00-100 Dollars, to continue Policy No. 197,244 on the life of Louis B. McWhirter in force and binding for three months from that date. Authority is hereby given John B. Hays, Agt., to receive the above-stated amount, and receipt for the said hereon.

Agreement contained in Policy respecting payment of Premiums:

"That this Policy shall not be in force and binding on this Company until the Advance Premium hereon shall have been actually paid during the lifetime of the Insured; and that if any subsequent Premium or Installment of Premium, on the Policy be not paid when due, then this Policy shall cease and determine and become and be null and void" (except as therein provided), "and that no pre-

mium on this Policy shall be considered as paid unless a receipt shall be given therefor, signed by the President and Secretary of the Company; and such receipt shall be the sole evidence of the authority of any agent to receive any premium on account of this Policy; and that all premiums or other payments on account of this policy are payable at the office of the Company in Hartford, Conn., and not elsewhere; but for the convenience of the person paying the same, such receipt may be sent to any agent or correspondent of the Company for collection; and payment to such agent or correspondent shall be held to have been made at said office of the Company."

EDWARD M. BUNCE,
Secretary.

Received amount as above this 18th day of June,
1892.

By JOHN B. HAYS,
Agent.

Mr. Thornton—Outside of the Connecticut Mutual Life Insurance Company, the deceased was insured in other companies to the extent of \$45,000, which has been paid, and that he was insured for \$10,000 in the Northwestern Life Insurance Company of Milwaukee, Wis.

Mr. Campbell—We agree that the insurance was all taken out between March, 1892, and June, 1892.

Mr. Thornton—Subject to correction by the production of exact dates. He had another policy for \$20,000 in the Providence Savings and Life Association of the United States; another policy for \$5,000 in the Union

Mutual Life Insurance Company of Maine; another policy for \$10,000 in the N. Y. Life Insurance Company; and two other policies in the Connecticut Mutual Life Insurance Company, which are the subject of this action.

Mr. Budd—We offer in evidence a mortgage from John C. Rorden of Fresno, Cal., to Miss Nannie Blasingame, dated April 2, 1888, for \$150 at ten per cent per annum, on lots No. 22 and 23 in Block No. 2, of Griffith's Addition to the town of Fresno, paid according to the record, by acknowledgment of N. S. Blasingame-McWhirter, on the 28th day of April, 1892.

It will be admitted that the date of the marriage between plaintiff and deceased was the 15th of February, 1889.

Mr. Thornton—Call it the 14th of February, 1889.

Mr. Budd—We offer in evidence a mortgage dated Sept. 28, 1888, from J. A. Lane to Nannie S. Blasingame on three lots in Block No. 339, in the city of Fresno, for \$1,000, which was paid on the 3rd of April, 1889. There is a note attached, bearing interest at ten per cent per annum.

Mr. Campbell—Let us get these exhibits marked. The \$5,000 policy, together with the application attached, will be Defendant's Exhibit No. 1. The \$10,000 policy with the application attached will be Defendant's Exhibit No. 2. The first mortgage of April 28, 1888, will be Defendant's Exhibit No. 3. The notes and mortgage of J. A. Lane to Nannie S. Blasingame of September 28th, 1888, will be Defendant's Exhibit No. 4.

Mr. Budd—We now offer in evidence, if the Court please, a mortgage from J. Ferber and Annie Ferber, his wife, to Miss Nannie S. Blasingame, dated the 17th of March, for \$400, payable one year after date, with interest at $1\frac{1}{4}$ per cent. per month, compounding every three months, together with the endorsement of the satisfaction of said mortgage and payment thereof to N. S. McWhirter, nee Blasingame, on March 2, 1889. That is on lots 8 and 9 in Block 26 of the City of Fresno.

Admitted in evidence and marked "Defendant's Exhibit No. 5."

Mr. Budd—We offer in evidence, if the Court please, a deed from Nina S. Blasingame to Mary J. Blasingame of the 12th of February, 1889, for lots 8, 9, 10 and 11, in Block 3 of the Riverdale Addition to the town of Fresno, for a recited consideration of \$850. This is dated two days before the marriage.

(Admitted in evidence, and marked Defendant's Exhibit No. 6).

We now offer in evidence a mortgage given by Nina S. Blasingame of the County of Fresno, to the Farmers' Bank of Fresno. The note is dated December 18th, 1889, but the acknowledgment is dated the 19th of December, 1889, for \$600, secured by portions of Block No. 96 in the City of Fresno, payable one year after date, with interest at one per cent. per month from date, which mortgage was released and paid to the bank on the 27th of October, 1892.

Admitted in evidence, and marked "Exhibit No. 7."

Mr. Budd—We now offer in evidence, if the Court please, a mortgage by N. S. McWhirter to the Fresno

Loan and Savings Bank on lots Nos. 25 and 26 in block 78 in the town of Fresno for the sum of \$400. The date of the note is July 3, 1891, with interest at one per cent. per month, compounding semi-annually, which mortgage was released on the 6th of October, 1893.

Admitted in evidence, and marked "Exhibit No. 8."

Mr. Budd—We now offer in evidence a mortgage dated May 15th, 1889, by N. S. McWhirter, formerly Blasingame, to the Fresno Loan and Savings Bank, on lots 29, 30, 31 and 32 in Block 109 in the town of Fresno, for the sum of \$1,500, payable six months after date at the rate of one per cent. per annum, compounding semi-annually, released October 6th, 1893.

Admitted in evidence, and marked "Defendant's Exhibit No. 9."

Admitted by counsel that the homestead of Mr. and Mrs. McWhirter was lots 20, 21 and 22 in Block 339.

Mr. Budd—We now offer a mortgage of the 1st of May, 1892, executed by Nannie S. McWhirter and Louis B. McWhirter to the Fresno Loan and Savings Bank on their home—lots 20, 21 and 22 in Block 339, for \$1,000, payable six months after date at one per cent per month, released October 6th, 1893.

Admitted in evidence, and marked "Defendant's Exhibit No. 10."

Mr. Budd—We now offer in evidence a deed from Nannie S. McWhirter, formerly Blasingame, wife of L. B. McWhirter, dated May 24th, 1889, to R. Hedinger, for the northeast quarter of Section 15, Township 12 South, Range 18 East, M. D. B. M.

Admitted in evidence, and marked "Defendant's Exhibit 11."

Mr. Budd—We offer in evidence a deed from N. S. Blasingame to W. D. Tupper of the town of Fresno of lots 5 and 6 in Block 96 for the recited consideration of one dollar.

(Admitted in evidence and marked "Defendant's Exhibit 12.")

Mr. Budd—We offer a collateral deed from Miss N. S. Blasingame of the 28th of September, 1888, to J. A. Lane, for portions of Block 339, being lots 17, 18 and 19 of the block, for a recited consideration of ten dollars. That is the date of the mortgage.

The Court—This becomes quite a distance prior to the marriage, and I think you had better reserve that paper until you draw out the different facts in relation to the payment of that money. As yet it does not appear that this bears upon the question.

Mr. Campbell—We note an exception, if the Court please.

Mr. Budd—We offer a mortgage from W. D. Tupper of date the 5th of September, 1887, to Nina S. Blasingame for \$775.00 on lots 5, 6, 7 and 8 in Block 96, and lots 13, 14 and 15 in Block 98, in the city of Fresno, released as to lots 13, 14 and 15 in Block 98, on the 13th of March, 1888, and released in full on February 1st, 1889.

The Court—The paper may be received to show money paid on February 1st, 1889.

Admitted in evidence and marked "Defendant's Exhibit 13."

W. W. Phillips, a witness called on behalf of the defendant, testified as follows:

Have resided in Fresno about twenty-three years, and knew Louis B. McWhirter ever since he resided in Fresno. I think he came there to live in 1888. For the last six years I have been Vice-President and Manager of the Farmers' Bank at Fresno.

Prior to Mr. McWhirter's marriage in February of 1889, we were living at the same hotel, and became very well acquainted. He came to me a short time before he was married and asked me to loan him \$250 to pay his wedding expenses, which I loaned him, and the money was returned to me sometime in December of the same year.

I negotiated a loan with Mr. McWhirter of \$600, signed by his wife, on some property that she owned, on the 18th of December, 1889. It was a short time after this loan was made that he paid me the \$250. I don't know whether the \$250 was paid me out of the identical money that was loaned him, but in looking up my individual accounts with the bank I found I was credited with \$250 on the 30th of December, 1889. It seems to me that the mortgage hung fire for several days in the examination of papers, and I am not sure just when that money was paid to him.

That mortgage for \$600 was paid on October 27th, 1892, after the death of McWhirter.

At the time that Mr. McWhirter was in the mountains, in the summer of 1892, I wrote him that the loan was long past due and that we desired the money; that it must be paid, or we would have to start a suit of foreclosure. This was during the summer vacation

which McWhirter took just before his death. I did not see Mr. McWhirter when he came back.

We also had some collections against Mr. McWhirter for some insurance companies—what were termed renewal receipts of the Providence Savings and Life Insurance Association. They were in the hands of our collector, and he had sent notices out, and Mr. McWhirter came in one day in answer to them, and asked the clerk who had charge of these collections whether, if he came in after banking hours on the day that these collections were due, the clerk would accept the money, and my recollection is that the clerk came to me and asked me whether he should give him after banking hours, and I told him yes. He did not pay it prior to his death.

At the time he died the renewal receipts were in the hands of the collector of the bank.

I was well acquainted with the people of Fresno and their financial standing at the time that Mr. McWhirter died. From the month of March, 1892, up to the time of his death, he had a very limited credit. I have a general idea as to what his financial standing was. He was considered an honest, upright gentleman, but he was a man of no property that I knew of. His credit for current bills made by himself as a rule was very good; that is, for current bills. He had no other credit financially that I am aware of.

CROSS-EXAMINATION.

The renewal receipts were not due at the time of Mr. McWhirter's death. They became due a few days later—one on the 2d of September following and one

on the 25th of September. I think the amount of these renewal receipts was about \$86.00 a piece, something like that. He had simply been notified that they were in the bank and the time they were due.

McWhirter borrowed the \$250 from me about a week before his marriage. He said, "Phillips, I want to get married in about a week, and am a little short of funds. I am expecting some from the East, and would like to borrow \$250." I thought he made the application to the bank, and said, "Mac, I will have to require some security if you ask a loan from the bank." "No, no," he said; "I simply ask it of you individually as a personal favor to me, from your own funds."

That was an individual transaction. I loaned him my own money, and did not even take a note for the money. It was an accommodation matter just pending until he could get some money from the East.

Mr. McWhirter drew several drafts, I think, on his father, at different times, and I never remember of any that were returned.

RE-DIRECT EXAMINATION.

It is so long ago that I cannot remember upon whom the drafts were drawn. They were usually very small amounts, \$25 or \$50. I don't remember any larger amounts. The drafts were drawn soon after his arrival at Fresno, and I think all prior to the time of his marriage.

RE-CROSS EXAMINATION.

My recollection is that the drafts were usually small, and I cashed them without any question because of their size. I have only an indistinct recollection as to

the amount and the time, because it has passed out of my mind. It is a small matter.

He did not offer to give me any draft at the time he borrowed the \$250 from me.

Edward S. Valentine, a witness, sworn on behalf of the defense, testified as follows:

I am a life insurance agent, and resided in Fresno from October, 1889, to February, 1892.

During my residence in Fresno I became acquainted with Louis B. McWhirter, and in the months of May, June and July, 1892, I was representing the Mutual Life Insurance Company of New York. About that time I met Mr. McWhirter on the street, and he recalled a promise he had made me if he had any more insurance he would patronize me. He called that to my mind, for which I thanked him, and he asked me to give him figures on a 20 payment life plan for \$20,000. As near as I can remember this was in the month of May, 1892. I told him the rate would be \$735 or \$736 on \$20,000 per annum, on the 20 payment life plan. He preferred that plan of insurance. Then he proposed that I take his notes in payment of the premium, due in 7 or 8 months, or "after the election" as he termed it. I believe that he proposed to give two notes, one due possibly in four months and the other in eight months. I was unable to accept the note at that time, and told him I would have to get money enough to pay the net premium, and that I would find out if I could raise the money on his notes, and would meet him the next day. The next day I met him and told him I could probably arrange the matter if I could have his wife's

signature on the notes. That seemed to displease him very much, and he told me he was responsible for his own actions, and did not propose to ask anyone to endorse his paper, and to let the matter drop.

I had gone to Mr. Richmond, the cashier of the Farmers' Bank, and asked him if he would advance the net premium, which at that time was about 50 per cent. of the first annual premium on Mr. McWhirter's notes. Mr. Richmond shook his head and referred me to Mr. Phillips. I afterward saw Mr. Phillips, who said he was sorry that he could not handle the notes, and that he thought it would be doubtful if I could negotiate them, especially on such a long time. Mr. Phillips said if I could get his mother-in-law to endorse them he would get me the face value of them. I was endeavoring to hypothecate the notes for fifty per cent. of their face value, and was unable to do so, and the insurance transaction fell through.

CROSS EXAMINATION.

The first conversation I had with Mr. McWhirter about taking life insurance was, I think, about the early part of 1891. It was soon after taking a policy with the Connecticut Mutual, and he consulted me about the Company. I told him it was a first-class company, stood well, and that he had a good contract. He seemed to apologize for not taking it with me, because he had promised to take insurance with my company, but that his business relations were such that he must take it with that company. That if at any future time he should take any insurance, he would be very glad to take it with me.

I think it was before the State Democratic Convention was held in Fresno that he first spoke to me of the amount and the kind of a policy he wished to take out in my company. We had two or three conversations about this.

I did not know the amount of insurance McWhirter was carrying at that time. It is necessary in making out an application for insurance in our company to state what insurance is already on the life of the applicant.

RE-DIRECT EXAMINATION.

I did not get so far in this insurance matter with McWhirter as to an application.

Dr. A. J. Pedlar, a witness called on behalf of the defense, testified as follows:

I have resided in Fresno for the past 14 years, and am a physician and surgeon. I was a friend and the family physician of Louis B. McWhirter, and was called in to attend him at the time of his death. I reached his residence at about 20 minutes past three A. M., and found him lying on a sofa in his dining-room in an unconscious condition and breathing very laboredly. I found a gunshot wound of the left breast, about one and a half inches to the right of the nipple proper. He still had on his night shirt and his undershirt. The former was of some white material and was considerably powder-burned about the margin of the wound, the point of entrance of the bullet, and also some of the powder-burn on the night shirt underneath. There was some blood—a very small quantity of blood, oozing from the wound, and the shirt had also become somewhat bloody, particularly

on the lower side of the wound. The quantity of blood oozing from there was very slight.

The bullet struck the lower border of the fourth rib from the top, its course was downward and almost directly backward. I would not be positive about that, but I think a little bit toward the median line. I took the ball from just below the point of the shoulder-blade on the back of the left side. The bullet was lodged in the muscles of the back and I cut it out. The angle that the ball took was between twenty and thirty degrees, I should think, and the ball traveled I should think between 9 and $9\frac{1}{2}$ inches probably, and probably 2 inches downward.

That garment which you show me has every appearance of what he had on at that time, and the shirt is in about the same condition so far as the location of the gunshot wound is concerned, I think. That tear or cut in the shirt has been done subsequently. The pronounced powder mark that I allude to is about the size of a dollar. There were some grains, if I recollect right, spattered outside there, but the distinct mark was about the size of a dollar.

That is, I think, the undershirt that he had at that time, and it is in about the same condition now.

Night shirt and undershirt offered and admitted in evidence, and admitted by the plaintiff to be the identical garments worn by the deceased at the time of his death.

The Witness—I found no other wounds on his body, nor scratches, discolorations or abrasions. The bullet wounded the left lung and the heart, striking the edge of that rib, and then going through nothing but soft organs.

As near as I could say that which you show me is the bullet which I took from the body.

(Bullet offered and admitted in evidence, and marked Defendant's Exhibit 16.)

I think the bullet is in the same condition that it was when I took it from the body.

CROSS EXAMINATION.

I knew Louis B. McWhirter I think about five years. His height was five feet nine inches, and he weighed about 165 pounds. He was as nearly a typically developed man as I ever made an autopsy on. He had no surplus fat on him, but was a well developed and well nourished man. His chest was full, well formed, and well developed.

Q. What would have been your estimate or opinion of his personal strength?

Mr. Campbell—I object to that, if your honor please; I don't think a physician could tell what the strength of a man was.

The Court—That is pertinent what his strength was. I suppose this witness would be competent to tell what his muscular development was. Answer the question.

Mr. Campbell—We take an exception.

The Witness—He was a man of more than ordinary strength I should judge. On the morning of the shooting I saw two pistols exhibited at the McWhirter house, which were in all respects similar to these which you show me.

I do not know whether McWhirter was left or right-handed with a pistol.

My house is about 900 yards from McWhirter's, and I don't think it took me over six or seven minutes

from the time I was awakened to get to his house. When I arrived there the body was on the sofa in the dining-room, and I remained until he died, which I think was about twelve minutes after I got there. He was unable to speak, and I think he was incapable of recognizing anybody. There was a deep-seated and regular moan accompanying almost each breath. There were several people in the house when I got there.

After McWhirter's death I had his body conveyed from the sitting-room into the parlor, and remained in the house until after sunrise—an hour or an hour and a half after my arrival—and then I went home.

Went out in the back yard before I left for home and looked at the premises.

I have had such an experience in the treatment of gunshot wounds as a practice of fourteen years in Fresno and two years in Truckee would give a man.

Such a time has elapsed since the staining of this shirt that it would be difficult to indicate anything more than the very deepest stain. As far as the deepest stain is concerned — about the size of a silver dollar would give that—my recollection is, however, that the blood and powder were intermingled very extensively together in this area, and it is impossible to indicate anything beyond the deeper staining. I cannot say from the present indications whether any portion of it is caused by powder-burning or grains of powder. It is only from my recollection that I say so. I believe a portion of it was caused by powder. The difference between discolorations made by blood and made by powder can be de-

terminated very readily when freshly made by the difference in the color, and also by the dusty or gritting feeling of the powder. A stain made from blood on a fabric of this kind, the moistening element of the blood would show and be disposed to spread beyond the area that had received the clot. The powder would not be so apt to show that. It would be a more distinct and well-defined stain.

Most of the blood expelled from the wound was arterial blood. The venous blood is the darker in color. The external hemorrhage from this wound was very slight; internally very great and general. The hole was as clean a hole as you often see from a bullet from a gunshot wound.

I found no fragments or any pieces of the fiber of either of these garments in tracing the course of the wound, and if there was any there, I think my examination would have revealed it.

RE-DIRECT EXAMINATION

The immediate effect of such a wound as that inflicted upon McWhirter would be very nearly synonymous with a profound collapse, and would produce paralysis. All feeling and intelligence and voluntary motion would almost cease. His ability to express feeling would cease, and all intelligence is suspended, as well as the operation of the mind. It would produce such a change or loss of co-ordination of movement that he would be apt to fall, if not immediately, almost immediately.

When I got to the house the deep powder stain that I outlined this morning to the extent of about a dol-

lar was very perceptible, dark and black, very much as you see it now. It is so deep there that it has not faded very much, the powder stain having gone right through the cloth, and had also stained the under-shirt to some extent. It was distinct and black and shaded off like powder burns usually do.

When I arrived there there was no coagulated blood spread over the garment, only what had coagulated in the meshes of the garment. When exposed to the air blood will coagulate very rapidly. There were some extra grains of powder showing outside of the deeper mark.

RE-CROSS EXAMINATION.

In a person shot as McWhirter was there could be convulsive action and nervous action without intelligence. I saw a man shot through the heart and he staggered about from 6 to 8 feet from where he was shot.

RE-DIRECT EXAMINATION.

A person shot as McWhirter was could not afterwards have fired two shots intelligently.

RE-CROSS EXAMINATION.

Mr. McWhirter's disposition was a cheerful one whenever I had any conversations with him.

Mrs. Nannie S. McWhirter, called for the defense testified as follows:

DIRECT EXAMINATION.

To Mr. Campbell—Q. Did you ever have given to you, or find after your husband's death, a letter written by him of instructions to you? A. I did.

Q. Where is that letter?

A. I don't know, sir. I put it in my trunk when I went East after my husband's death, and it remained there, I suppose, until I went North, in March, I think it was. I was very ill, and when I returned to Nashville the carpenters had taken charge of my uncle's house, where we were boarding, and one trunk I left in the house, and it was put in a trunk-room until I went to Franklin, Kentucky, where I remained one month. Then I returned to California, some time the latter part of May—I don't remember the date—and during the Heath trial I looked for that letter, thinking it might be of some use, but I could not find it.

Have not seen the letter since before I went to Oregon. It was originally brought to me with some other papers, some of my mother's, and others that were brought from my husband's bank box by Mr. Thompson or my brother Lee, I have forgotten which.

CROSS-EXAMINATION.

To Mr. Thornton—The letter was dated the 25th of June, I think, 1892.

A. U. Warnekros, a witness produced on behalf of the defense, testified as follows:

I have resided in Fresno for the past eight years, and am a gunsmith.

I knew Mr. McWhirter very well. He dealt with me at times, and in 1891 I sold to him a 41-caliber Colt's new navy pistol, one that the chamber throws to the side for the purpose of ejecting. It was a pistol similar to the one which you show me, marked People's Exhibit No. 6, People vs. Heath.

The other pistol that you hand me, marked Exhibit No. 5, People vs. Heath, with a triangle on one side, and "H" on the other, and an obliteration of a number at the butt, and the obliteration of the number on the trigger guard, but not in front of the trigger guard is a 41-caliber pistol, and both the pistols are made by the same company, and carry the same size cartridge.

Exhibit No. 16, the bullet which came from the body, is as near as I can judge, a 41-caliber ball.

I cannot tell what caliber that mashed bullet is.

This bullet which you show me is a 32 short, rim fire.

This bullet found in Clark's yard or in the outhouse is of 41-caliber, and the bullets found at the base of the fence of the chicken yard are 32-caliber.

I have sold Mr. Whirter 32-caliber bullets; Mr. McWhirter had a thirty-two caliber rifle on the ranch or in the house. I sold him a box of 32-caliber bullets before he went to the mountains. They were 32 short.

The three empty cartridges and the three cartridges from the old pistol and from the new were all 41 short bullets, and the bullet found in the body was also a 41 short bullet.

I sold and delivered this pistol to Mr. McWhirter on or about March 27th, 1891, for \$16.50.

CROSS-EXAMINATION.

The pistol I sold Mr. McWhirter on March 17th, 1891, is the only one I ever sold him. He was in the habit of dealing with me in the purchase of firearms and ammunition, and I knew him very well. He

also purchased from me a double-barreled shotgun several years ago, I think. I never heard of his buying from any one else. He came to my establishment for the purpose of laying in a supply of ammunition and firearms prior to his going to Pine Ridge on the third of July. At that time, as near as I can recollect, he bought about 200 of shotgun cartridges, some 32 cartridges and one box of 41 long for his pistol.

Mr. Budd—We now offer in evidence, if the Court please, all the statements of the plaintiff, the evidence of the plaintiff herein on the coroner's inquest held in Fresno September 7, 8 and 10th, 1892.

Objected to, and decision reserved by the Court.

Thomas Rhodes, a witness sworn on behalf of the defense, testified as follows:

I reside in Fresno, and am acquainted with Mrs. McWhirter, and knew her husband in his lifetime. At the time of Mr. McWhirter's death I was working for a man named Clarke, as gardener.

(Referring to diagram)—This is supposed to be L street, this Calaveras street, and this the alley between the McWhirter residence and Mr. Clark's. This is McWhirter's house, this the Southworth house, north of it. South directly is Dolph Lane's place, and south of that is another place owned by him. He owns the two on the corner. This is Mr. Clark's residence. I slept in this little bedroom off from the pine woodshed adjoining the north line of the Clarke lot. The mill is correctly represented. This is McWhirter's house facing to the west. On the south side of it is a bay window which looks out on the south, there being windows on each side.

Q. That is, this bay window is a square window, with windows to the east, windows to the west and windows to the south?

Mr. Thornton—That is an admitted fact.

The Witness—This is the window in the bedroom of McWhirter (showing on diagram). South of that there is a walk around the house from the front door and going into the office, and south of that walk there is a grass plat. I think the distance from the bay window to the fence on the south line of McWhirter's premises is about 15 or 20 feet. The fence south of McWhirter's place is a close board fence about four feet high, I should judge, between Lane's and McWhirter's, and it is whitewashed. That is the office McWhirter had in the back yard (showing.) From the bathroom to the corner of McWhirter's office is 35 feet six inches, and the depth of the office is 16 feet 3 inches and the width 14 feet 3 inches. This represents the water closet in that corner and the lattice work. It is 14 feet 6 inches long, and the width of the whole here is 7 feet 9 inches, and it is thirty inches from the water-closet to the lattice work on the west and fourteen inches on the east to the back fence. It is four feet $3\frac{1}{4}$ inches wide by four feet $3\frac{1}{4}$ inches square. Mr. McWhirter kept a horse in this shed at one time, I believe, and that is a barn. This is a high lath fence and in here they used to have a chicken place. Here there is a fence with a base board to it—a foot board, and on top of that are the uprights.

On the night McWhirter was killed I was sleeping in this bedroom. At half past two of that night I got up to shut off the windmill. I heard the water over-

flowing the tank, so I got up and went and pulled down the lever and stopped it from pumping, and went back to my room and lit a match and looked at the clock and it was half-past two. I heard the shooting. The first impression that came to my mind was that there was a horse kicking. The shooting went kind of quick. There seemed to be a stoppage before the shooting ended—just so you could notice it. Then I heard a woman's voice screaming. I rushed from my room, not stopping to dress myself, and rushed to this fence in a straight line. It is about 7 or 8 feet high—it is the west Clark fence. I got up on the fence, the screaming continuing all this time, and saw Mrs. McWhirter and Mr. McWhirter lying down. I found out it was he afterwards. I saw a body lying there and Mrs. McWhirter was calling for help, for some one to come, "Murder," or something that way. I spoke to her and asked her what was the trouble. She put up her hands and said, "O, Mr. Clark, come over here." She took me to be Mr. Clark, the man I worked for. I ran back to my room and dressed myself and come over. When I got there there was no one present but Mrs. McWhirter and her husband, who was lying down. I have an idea that Mrs. McWhirter screamed before the last shot was over. It strikes me that way. I know there was no shooting after I left my room. I was in my room when the shooting ceased.

I did not hear any voices or loud talking or other noises in McWhirter's backyard. He helloed "O," and that was the only sound I heard. I did not hear anybody running away from there or any other

sounds. I then went back and dressed and came over to Mrs. McWhirter. The body was lying 15 or 16 feet from the fence in west on the little path, about here. It was just about west of the gate. It lay over here diagonally towards the house from the post. His head was towards his back fence—toward the east and his feet was towards the west, to the front fence. His head lay toward the alley and his feet toward the house.

When I got over there on the second occasion I spoke to them and got down and raised his head up a little, and asked him where he was hurt. I thought he was talking, but instead of that he was groaning. I could feel him trembling, and thought he was badly hurt. Then I told Mrs. McWhirter to go for the doctor. She asked me to get some of the neighbors in, and I started for the doctor then. In going for the doctor, I continued on this path where I left him lying and come south of the house on the regular path and out onto L street. The next person I saw after seeing Mr. and Mrs. McWhirter was the young man who came to Dr. Pedlar's door.

I walked back to the house, and coming back I met John Muller and a man named Stewart Reed.

He asked me what all the shooting was about and I told him that it was McWhirter that was shot. The three of us got back together, and when I got back there was quite a crowd around the place. When we were walking toward the house we saw a crowd coming in and out the front of the house, going up the front stairs and into the back room, and there was a crowd of men in the back part of the house. As I

was coming down I could see lanterns. I did not go there. I went into the house to see how he was hurt.

The gate leading from McWhirter's place to the back alley is about as high as the fence, close boarded, I think, I am not sure. There is a sort of latch on it, and coming in or out of McWhirter's back yard you simply have to touch a latch, it being neither bolted or locked in any manner.

When I stooped down to speak to McWhirter that night I noticed two boards off the fence. They were right close to and north of the water closet, about there (showing).

The trees at Mr. McWhirter's place were inside of his fence, and there were no trees out in the alley at all.

Clark's fence was a good deal higher than Mrs. McWhirter's fence, Clark's fence being all of seven or eight feet high, and in looking over Clark's fence that morning I ran up a pile of wood that lay alongside the fence, and looked over and saw where they were. I found a bullet in the fence near the water closet and there was two higher up and further north of the fence.

Q. Was the board or the place where the bullet was in the fence north or south of the opening where these boards were off? A. The lower one?

Q. Yes.

A. I am not quite sure. I know the other two high ones were north.

Q. But you can't remember whether that was north or otherwise?

A. No, sir; it was right close up. I can't tell now whether it went south or north. It was down. I did not notice whether the fence was powder-marked or otherwise. One bullet was up in the corner of the water closet, that was far up, and another bullet hole that went through the water closet. It went right straight through, about the height where a man would stand and shoot right through. If a man stood where McWhirter had fell it is about just where those balls would go. I think the ball went through here and into the Clark fence.

Photograph offered and admitted in evidence, and marked "Defendant's Exhibit 21."

The Witness—(Exhibiting photograph to the Jury). This is where the Clark windmill was, this dark shading here, the fence, that is the back fence of McWhirter's yard, where it is lighter that is Mr. Clark's, about three feet higher, some like that, it is 19 or 20 feet between the alley-way. Here is represented a post or clothes line. You can see the roof of the water closet, and that is the screen that hides the water closet from the house. Here is where the boards are off, and the slats are nailed across, the boards being off. Here is the bullet hole that was shot down. That kind of dark hole represents the water closet, that went up in the eaves of the roof. And here are the other two in the white fence.

When I come back from Dr. Pedlar's there was all of twelve people there. They were looking around and examining bullet-holes and talking. They were going around there promiscuously, examining these different objects and different places.

I cannot tell how many shots I heard. I swore at the coroner's inquest there were all the way from five to eight. I could not tell how many shots were fired. I never could. There was an interval between the shots, just noticeable. The shooting was very quick, and there was a stoppage once or twice, it seemed to me, and it strikes me a woman screamed before the shooting ended. I could not tell whether she screamed in the house or out of doors.

CROSS-EXAMINATION.

My leg has been broken ever since I was eight years of age, but I make my living by being on my feet all day. I cannot be called an active man.

The first impression when I awoke was that of a horse kicking, but just as soon as I got up I knew it was shooting. The second shot satisfied me that it was a shot. The first shot I thought was a horse kicking.

When I first ran out of the house I only had my night clothes on, and then I went back and put on my pantaloons, coat and shoes. The second time I cannot recollect whether I went over the fence or went around the gate by the windmill. When I went to surmount the woodpile I missed my footing and fell on my knees, and then came up and looked over the fence, went back to my bedroom, and put on my clothes.

From the time I awoke until I reached Mrs. McWhirter's side by her husband, it was all of three minutes.

From this water-closet to the end of the alley-way in Calaveras street is seventy-five feet. In other words a person would only have to go that distance to get to Calaveras street.

I was in some degree of mental and physical excitement at that time, but I was not bewildered at all. It never entered my head to look in either direction for any supposed assailants. My whole attention was concentrated where the woman was screaming.

I did not pay any attention to the separate reports of the discharges which I heard in regard to their degrees of loudness. All I noticed was that there was a stoppage. They were not fired right quick, one after another. There was a stoppage between. There might have been a couple of shots fired one after the other. Then a couple of more, probably three.

Q. And then the final shots, if there were any more?

A. I could not say. The first shot sounded to me when I woke up, the shot I took to be a horse kicking. That might be on account of my sleep, just waking up, that sounded different from the rest. The way I satisfied my own mind it might have been fired by a man in the water-closet.

Q. It would have a hollow sound like that of a blow struck upon a drum?

A. It seemed different from the others. That might be on account of my sleep. I could not say.

Before Mrs. McWhirter screamed I heard the hello like a man in pain. In my mind it seems to me

that Mrs. McWhirter screamed before the last shot and the hello was before her scream.

The weather on that night was cool for Fresno.

RE-DIRECT EXAMINATION.

When I was awakened by the shooting I ran to the fence as fast as I could, and I can run and walk pretty fast, making my living by being on my feet all the time.

I got up, and I know when I got outside of my door there was no more shooting. The shooting was going on while I was preparing to go out. When I got outside there was no shooting.

From the time I left my door to the time I got to the fence I heard no noise, or talk, or scuffling, or nothing except Mrs. McWhirter screaming.

RE-CROSS-EXAMINATION.

Mrs. McWhirter's screaming was apparently at the top of her lungs, and she was making all the noise I think a woman capable of under the circumstances.

There were no precautions taken by any person to close this alley at either end up to and after daylight of that morning. I stayed around the premises that morning probably until half-past five or six o'clock.

(Agreed between counsel that daybreak occurred at 5:20 A. M.)

Every person who desired entered and walked in upon those premises from either end of this alley without any interference from anybody. Before I left the premises there were probably from 12 to 30 persons. Certainly not less than 12 and probably 30.

RE-DIRECT-EXAMINATION.

From the very moment I got there people were coming and going in the streets and tramping up and down the alley and all over the yard.

F. F. Babcock, a witness sworn on behalf of the defendant, testified as follows:

I live in San Francisco, and am employed by Mr. C. J. Stillwell. On the night of the killing of McWhirter I was a police officer of the City of Fresno, and had been such for a year previous.

At the time of the shooting I was on the corner of G and Tulare streets, Chinatown.

Q. What drew your attention, Mr. Babcock?

A. Hearing some shots.

Q. How many?

A. Five or six. I was on the street at the time, in Chinatown, outside the reservation. The McWhirter house is in Block 339, which is on L and Calaveras streets. I was standing right at the door of the saloon that was on the corner of Tulare and G streets. It was a calm, still night. I say I heard five or six shots, my attention as a police officer being called to them. I started to run in what I thought was the direction of the shots. On the corner of Merced and J street I met Pink Farley, the night watchman. I also met Mr. Davidson, the gentleman who lives right opposite Mrs. McWhirter's. He was after the doctor at the time and I went with him. It took me about 7 or 8 minutes to get to Mr. McWhirter's house including stops and everything. When I got there the first man I noticed was a man named Godchaux, of the Kutner-

Goldstein & Co., and there were several others in the room that I knew by sight.

I went into the house as soon as I got there and was in there a couple of minutes.

There were several people in the house when I got there and the body had been taken in. I did not see the doctor there. I could not say who was there. Mrs. McWhirter was in the room. When I went into the room Mr. Godchaux sat right at the door and Mr. McWhirter was laying on a lounge and Mrs. McWhirter was standing directly over him.

When I went into the yard Officer Welch, George Rupert and a lame man named Rhodes were there and Mr. A. M. Clark. We examined around the yard, I could not say how long, and examined where Mr. McWhirter was found, and Officer Welsh found a revolver. When I came out of the house I went into the yard past the office. The revolver was the first thing found, which was picked up about in here (showing) near that post. It might have been $3\frac{1}{2}$ feet back from the post towards the house where the revolver was picked up. I noticed the mark of the body.

Q. How far was it from where the body—

A. Where Mr. McWhirter is supposed to have lain on the ground, the pistol was lying at his right hand—to the south. The body lay with his feet toward the post and the head toward the house and a little to the north. The pistol was found alongside of the mark of the body.

The distance from the alley fence to where the pistol was about 12 or 15 feet, perhaps about three feet south of the gate, as near as I can remember, near

the post, between the post and the office, and three feet to the west of that brace. The pistol marked "Exhibit 6," People vs. Heath, is the pistol found alongside of the body.

We then walked around the yard here, and walked over towards the back yard fence, and found two clubs and another revolver. Those clubs marked Ex. 7 and 8, People vs. Heath, are the clubs we found.

Q. Are they in the same condition?

A. This one here has the rope off and the tack out of it--out of the crack there. This one with the rope on it and the tack out of it was lying between a tree and the opening in the fence, but out away from the fence. The other club was standing against the fence near the opening in the fence. That one did not have anything on it. It was right near the post that is shown there near the tree.

It was set up right alongside of that post. I also found the two boards that had been knocked off the fence set up against the fence in the alley. Those are the two boards which you show me. They were set up against the fence something like that, south of the opening. I left them there, and never examined them at all.

In the same vicinity I found another revolver. That is the revolver. I took it home with me. It was in the same condition at the time I found it as it is now, with the exception of being loaded. The numbers had been taken off in two places. That pistol was lying on the ground in the same locality as the club that had the rope on.

At the time we found the club and the revolver, Officers Welch and Rupert were with me, and one or the other of them kicked a rag that was there away. I afterwards picked it up. It was lying against the fence when I picked it up.

I found a piece of rope of the character you show me around the club, in the form of a loop. The rope was held in place by a tack so that it would not slip. The tack was right through the rope into the wood. A little before nine I turned the things over to Sheriff Hensley.

I did not notice whether the nail in the club was rust-eaten or not.

That is the mask I found. It is the rag that I said had been kicked to one side by Officer Rupert or Welch, and which I afterward picked up. It was in the same condition as now as to being torn. When I first found it, it had been lying nearer the clubs. I think it was kicked away. I could not say the exact position that it was in, because they kicked it away. I afterwards picked it up and found it was a mask, and took it with me.

The rope which you hand me is the kind that was tied around that club. I noticed some of the same kind of rope on the clothes line, or near the lattice work there. There was some that run over there, and there was some near that lattice work. Some on the lattice work and near the clothes line.

Ned Winchell, the Deputy Sheriff, compared the two ropes together in my presence—the rope on the clubs and the rope on the clothes line.

I saw one bullet-hole going through the closet or back of the closet; there was another bullet-hole over

the closet door. There was one just above this opening in the fence, the direction of which was down. There was two or three through the fence, and it went right through. They went through into the other fence. The angle or direction of the ball above the door was up like my hand, and the one that went through the door was nearly on a level, and the angle of the one that went through the fence was downward. Some one put a pencil in there and it went right through the fence about northeast and downward. It was right near the boards. I looked at that hole a great many times but never saw any powder marks. The one that went through the door of the water closet I did not find where it went after it passed through the back of the water closet. I noticed the bullets in the east fence and where the bullets went through the Clark fence. They entered from the McWhirter place going out towards the alley, and went through the fence into the Clark yard. The ball at the bottom of the board went outward and so did the one through the back of the water closet, and the one that went up through the hole had an upward course. All of these five bullets were outward. I found no bullets taking an inward direction at all.

I was there in the chicken yard when the bullet was found when the coroner's jury was there.

I was at the coroner's inquest and went from the courtroom to McWhirter's place with the coroner's jury, and I saw the board in the chicken yard in which was imbedded a certain bullet, which was pointed out by Mr. Thornton. I also remember a sack that was on the south

lattice-work on the chicken yard fence. It was on the north side of the fence, on the south fence. As near as I can remember the fence was made of slats, with laths in between places. The sack was on the inside of that, about 13 feet 6 inches from the junction of the middle fence to the back fence and about fourteen and one-half inches from the ground.

The sack was a common gunny-sack, a barley sack nailed up, flat and doubled. That is, there were two thicknesses of it. The hole on the south side of the sack, towards the fence, was about the size of a dime. I should say about as large as my finger, and the other hole was larger than a half a dollar. The last I saw of that sack and that board they were at the Sheriff's office, and they were taken there by me, and I think I turned them over to Coroner Brown at the Sheriff's office. I did not see the bullet taken out of that board.

As far as I can see these clubs and exhibits are in the same condition now as when they came into my possession, and when I turned them over to the Sheriff, except this club had the tack and the rope around it. The clubs were in the same condition when I turned them over to the Sheriff's office as when I found them. With regard to the pistol there was three loaded and three empty.

CROSS EXAMINATION.

When I first heard those shots on the morning of the 29th of August, I did not make any effort to count them. All I can say is it left an impression in my mind that there were five or six shots.

That morning after daylight I observed some tracks near this open window, but I took no measurements of them. The tracks were very recent. The soil under the window was sandy, soft soil, and that near the window was wet.

I saw some foot prints in the alley going south from the rear, going toward Calaveras street, different in length and shape. They were going north up the alley and south down the alley. They were the only footprints that could be followed distinctly at that time. One of them was made by a shoe with a heel and the other one was by a shoe of some kind—a moccasin or tennis shoe without a heel. The heelless shoe measured 11 inches in length and $3\frac{3}{4}$ inches across the ball of the foot, and the other one was $11\frac{1}{4}$ inches in length by $3\frac{5}{8}$ inches in width. Equal in freshness with these was another mark of a footprint between the fence and the closet in the back yard, of a shoe with a heel. I found no mark of a heelless shoe in the McWhirter premises. The soil in the alley was very dusty.

I picked up the pistol with the letters delta H upon it. Officer Welsh was right there when I picked it up and I think Rupert.

I traced the tracks which I have described down south through the alley, across the street into the same alley in the other block, perhaps not quite half way through the alley in the second block between L, N, Calaveras and Tuolumne streets. When we got into this other alley the tracks grew very indistinct. The ground is harder there, and there is a good deal of straw and we could not distinguish the tracks. It was not dusty like this alley

here. That part of the alley was not as much traveled then.

From the appearance of the tracks of the person wearing the heelless shoe as he returned to the south toward Calaveras street, I had an impression that he was running. I don't know that I can explain my reason for thinking so. It was the impression I had from the length of the steps. I think the steps were apparently longer than those going north. George Rupert was with me when I traced those steps. Officer Welsh went with me into the alley, whether he went with me the full length I could not say, and Mr. Rhodes I think was also with me.

This examination of the footsteps took place immediately after finding the revolvers and the clubs. It was before daybreak. We went with a light. We looked at them after daybreak, but they had been almost obliterated, there had been so many people in the house.

I know Thomas Bury, detective. I first met him in Fresno. He arrived there immediately after the murder. I cannot say whether it was the same day or not.

Bury was there when the coroner's jury visited the premises.

Q. Did he inspect that seventh bullet hole concerning which you have testified, through the gunny-sack?

Mr. Campbell—We object to that. Mr. Bury is not on trial, or anything of that kind, and it is not cross-examination of anything that he said or did.

The Court—This witness testified to seeing the holes there. I think that is a proper question so far.

Mr. Campbell—We will take an exception.

Q. When were you made acquainted with Bury?

Same objection, ruling and exception.

Q. When did you become acquainted with Bury?

A. Very soon after the murder. Mr. Bury accompanied the coroner's jury to the McWhirter premises when you pointed out the seventh bullet-hole upon the north side of the fence when the sack was in place. Bury measured the distance from the fence to the bullet-holes with a metallic tape-line which he had, about half an inch wide, and he ran the tape-line through the bullet-hole and extended it to the place where the seventh bullet was found. He was endeavoring to get the range as well as the distance, and the effect of the movement of the tape-line upon the outline of the hole through the gunny sack was to enlarge it. I think that Bury had a lens or magnifying glass at that time of about 3 inches in diameter. After that seventh bullet was pointed out to me I examined the aperture in the sack with the glass. The hole in the sack had the appearance of being a bullet-hole, and the edges were apparently new.

Mr. Campbell—I move to strike out the testimony, because he is not shown to be competent to give an opinion.

Motion denied and exception.

I examined the edge with a lens or magnifying glass. The sack was apparently an old sack, having been left there on the fence for some time. There was dust and dirt upon the sack. In general the sack looked like a very weather-beaten sack. The color of the edges of the hole was lighter than the body of the

sack, and was nearer a yellow than anything else. The hole on the north side of the fence appeared to be about the same. The sack was nailed to the fence, and I don't know who tore the sack off.

To the best of my recollection now the soil in the chicken yard is a kind of sandy. On the north side of the sack there were places in the yard where the soil had been disturbed, apparently dug up, for a distance of seven or eight feet. When I first saw the board with the bullet in it, it was in the fence there. It was a kind of a baseboard. The top of the board was 12 or 13 inches. It was not a very long board, as I recollect it. I saw a bullet partly imbedded in the board, and the bullet which you show me looks very much like it. Where the bullet entered the plank it left a kind of path, scraping along, and it plowed up a path.

The appearance of the scar or track of that bullet in respect to newness in comparison with the rest of the plank was much newer. The bullet looked like a newly fired bullet. It had a metallic look about it. I don't know how long I have been acquainted with firearms and their use. I have been handling firearms for the last two years as an officer.

Q. Now, at the same time when Mr. Budd was present, three at least other bullets were found in the north main fence of the McWhirter premises. Were they?

A. Yes, sir. The boards were weather-beaten, pine boards and dirty. The three bullets and the 7th bullet so-called, which were found by Mr. Budd and yourself had all been fired directly into it at a right angle. In regard to those other three bullets, they presented the appearance of being aged.

When I said the south hole in the sack was as big as a dime and the north hole as big as a dollar, I had reference to the time before any tape-line had been put there, to my knowledge.

Q. How far were those two apart; I mean the two holes?

A. The thickness of the cloth. I think the large hole was a little more ragged. The smaller hole was cut cleaner or clearer than the larger one.

I never saw a bullet-hole before in a gunny-sack. You might say my experience with firearms has been limited. I have used them some, as a police officer. The sack was nailed loose on the fence. It was not drawn tight.

At the time the coroner's jury were there I know some one attempted to get the bullet out of the board, but Mr. Thornton objected to it.

Something being said about a small rifle that Mr. McWhirter had was what lead to the search for other bullets along the north line of the chicken yard. It was said that it was a 32 caliber rifle. There were two bullet holes and a bullet found along the base board on the same level as that found in the board in the corner, running along the same line of fence.

It was about thirteen days after the death of McWhirter that the coroner's jury made this examination.

The cutting up I speak of in the chicken yard was about seven or eight feet square in the middle of the yard.

Thomas Rhodes, a witness called on behalf of the defendant, testified as follows:

Q. Did you hear Mr. George Rupert at the time that one of these pistols was picked up, state it was the pistol of Louis B. McWhirter?

The Court—You should have asked him if he heard anything about it.

Mr. Thornton—We object to that. It has already been answered, and is purely negative testimony, and does not prove anything.

The Court—Objection sustained.

Mr. Campbell—We except.

Mrs. M. Bedford, a witness sworn on behalf of the defendant, testified as follows:

I live on L street, between Calaveras and Stanislaus, in the city of Fresno, and lived there in August, 1892. I was slightly acquainted with Mr. and Mrs. McWhirter.

I lived about 240 or 250 feet away from them.

On the morning of the shooting I was sitting up in bed awake, and I heard the shooting commence, and there were three shots fired, and then a woman screamed, and at that time I jumped right up—a woman screamed at the third shot, but I did not know who it was at the time, and I jumped up and ran to the window, and I heard six shots before I got to the window. I heard three shots before the scream and three afterwards, and that is all I heard. I counted them.

I went to Mrs. McWhirter's about half-past twelve that day, and in a conversation I had with her, she spoke about a conversation she had with her husband the day previous. She spoke about how she should rear their boy, and what he would like her to do; that

he would like her to raise him up to be polite and gentlemanly, and not be wilful and have his own way, and to send for Mrs. Duke, and to have her stay with her for five years at least, and to have him educated somewhere in the East, I don't know where.

See told me that Mr. McWhirter had told her that on the day previous, had made this request. That is, on Sunday, and if possible to send him to Europe for about three years at least, and she told him: "Papa, if you feel like that, why don't you write your statements down on paper, and I will carry it out to the letter if it is possible."

She told me that he made these statements to her on the day before, if anything happened to him what he wanted her to do with the child.

She also told me to go and look in a trunk that they had in the mountains, and see if he left a letter there, which I did, and I found a letter there, but it had been opened, and I handed the letter to her, and she opened it, and she said it was a letter that he had received from his mother in the mountains, and that was all I found there.

Afterward Mr. Lee Blasingame came in, and she asked him if they had opened the safe yet, she said there was a letter there for her, and he kind of said "No." I suppose she referred to Mr. McWhirter's safe, but I could not say. He did not make any reply to the second question.

Q. What was the second question?

A. If they found a letter for her, and he did not make any reply to the second question.

CROSS-EXAMINATION.

In that conversation she spoke about how happy they had always been, and what prospects they had ahead of them.

In counting these shots I did not count them out loud. I just counted them in my mind.

TESTIMONY OF MRS. McWHIRTER BEFORE CORONER'S JURY.

Mr. Budd—Now, if the Court please, we will read Mrs. McWhirter's evidence given at the coroner's jury:

I am the wife of L. B. McWhirter. At the time of his death on Sunday last he was 37 years old and some months. With the exception of 15 or 20 minutes, he was at home the entire day on the Sunday preceding his death, being absent between nine and twenty minutes after nine in the evening.

On Sunday Mr. Baker called and remained until about five in the afternoon, Mr. Thompson called, and Judge and Mrs. Tinnin came in the evening and remained until nine or five minutes after nine, and after they left my husband went for some tomares, and when he returned with the tomares, we found they were not as we desired, and he took them out into the back yard and threw them away. He then came back, and we went into the dining-room and eat our lunch. We then went into the back yard for a few minutes and came back into the house, and read. In 15 or 20 minutes I prepared to retire. I retired, and he did a short time afterwards. When he went

to throw the tomales out I did not go with him. He was not gone but a few minutes, and came back to where I was in the kitchen. After eating my lunch I went out to where the closet is, and went by the place where this opening is in the fence, and at that time there was no opening there.

He went to bed about half-past ten. The next thing I heard was my husband speaking to me, asking me if I heard any noise. He said, "I heard a noise as if some one was walking around the house and through the grass," and Dimple, Dimple, is our little dog. I listened for an instant and said, "I don't think you heard anything. It must have been Mr. Clark's windmill as I heard that made that particular creaking noise that a windmill makes in turning, and as I heard it often and often. I have often heard it in times past. He was sitting in the bed at the time, and with that he made a remark that he would eat no more watermelons this summer; that it had disagreed with him. I said "I would not eat any more of it if I were you, if I considered it was not good for me or for you in your condition." So he got up and put on his pantaloons and shoes, and he said to me as he left the room, "I am going out in the front way to see what that noise is." As he went out he must have struck the door bell. He called back to me that he had struck the door bell accidentally. I had moved into my dressingroom then, and as he passed the window, I said to him: "Was that you, sweetheart, that rung the door bell?" and he said: "Yes, I rung it accidentally," and he went on. He could not have more than gone to the closet door,

when I heard a report. I wondered if it might not have been a gate, and then the others came so rapidly I cannot account for them. I heard a groan, and then I ran into the yard, and he was already down, and anything that happened after that I have no clear recollection of. I was in my dressing room in the center of the house when the first shot was fired. On the first shot I wondered what the noise was, and then the shots came so quickly I thought something terrible must have happened, and I rushed out. I had two screen doors to open. I went through the enclosed porch. I don't know the number of shots that were fired. The firing had just finished as I got out of the house. I saw no flashes of a pistol. It was very dark when I got out. When I first saw my husband, he had fallen. My husband could not speak. He only moaned. It was about three minutes before any one came, and then Mr. Rhodes came, and Mr. Davidson about the same time and in an instant afterwards Mr. Clark, and two other gentlemen, and Mr. Clark and one other gentleman, I don't know who, brought him into the house. My servant came to me first, and then she ran over to Mrs. Southwood's and to Mrs. Clark just as the neighbors were coming.

At the time I got out I saw no one escaping. I did not hear anything in the shape of voices or anything else but his moan.

My husband had spoken about certain parties. We were remarking when we were eating something one of the gentlemen who had called told us, and we were discussing that almost during the entire meal. He told me that he thought he might have some difficulty

during the campaign. He felt that it was very evident, but he felt that if any one attacked him in an open way he could protect himself. I said to him: "I am so afraid of your life." He said: "On the street in the open daylight I am equal to any one else. I have no fear." He said to me all along about being killed and all that sort of thing, but the idea I have always derived from his conversation was that some one would attempt to kill him, and would wound him, and he might die from that, but I never supposed that he would be assassinated. The idea he has tried to impress me with, because I always became very much alarmed and very nervous, and was to keep me from feeling that he had a fear of assassination, because he evidently felt it very strongly. He told me that he had been followed by two parties at night, prior to his going to town. We started for the mountains on the third of July, and returned on the 21st of August. He did not know who it was that followed him. He told me that just before the primaries he was working in his study very late one night, and he heard a man making a slight noise, and my husband went out into the yard and asked him what he wanted, and the man went away very fast. He could not see who the man was, or anything about him. Since his return to the mountains he did not say anything about anybody following him home. There has been in his thought and in his mind a certain kind of presentiment that would lead me to believe that he anticipated death surely to come to him during this campaign, because things that we had discussed in regard to our little son would make me very serious indeed. I said to

him: "What do you mean—you will live a great deal longer than I." He said: "It is very uncertain for one such as I am." He never went into particulars. My idea was that he was not to be murdered, but that he might have some difficulty. On the Sunday previous to his death we discussed at our dinner the manner of taking care of our little son, and the manner of bringing up children, in the presence of Mr. Baker, and how he thought children should be educated, and the schools he should attend, and the manner of raising children. He always said to me that if he was called away from me, and was not able to raise our boy, "One thing I beg of you is that you shall control his will."

On Sunday I asked him to make me a waste bucket in the morning. He said he would make me two now, so he made two buckets. He simply said: "I will probably be busy in the morning, and I had better do it now, while I have time, even if it is Sunday."

I think he realized very thoroughly how he would come to his death.

He first told me about putting life insurance on his life in March of this year. The reason he gave me for doing so was that one who spoke as he did and gave his opinion so freely, were never, in a place like Fresno, sure of the future. I remember at different times he had told me he had taken life insurance out, and I laughingly said to him: "Why, papa, why are you carrying so much life insurance for?" and he said, "I am going to carry it until after the campaign," which was after the November election.

At the time of the shooting there was a light in the house. We always kept a light burning in the dining-room.

He never went out through the front door to get into the back yard before. When he got up he took the pistol from under the head of the bed. He had but one pistol in his hand when he left the room. He had at one time two pistols, one an old pistol, which he gave away. He had the old pistol just at the time he went to the mountains. He carried the new pistol in his scabbard. I don't know how he carried his other pistol. He gave the old one to my brother in the mountains.

During the whole course of my marital existence there was never anything which would tend to create the suspicion that anything but affection existed between Mr. McWhirter and myself.

I never have owned a pair of stockings of the material of which the mask was made. I have never owned any garment of that material, nor has Mr. McWhirter.

Mr. McWhirter's office was built in January or the first part of February, and after it was built there was a surplus of nails left over, which were put in a box and set by.

Mrs. J. A. Lane, a witness called on behalf of the defense, testified as follows:

In 1892 I was living in Fresno on L street, and there was one house and lot between my house and that of Mr. and Mrs. McWhirter's, with whom I was intimately acquainted. I was not in Fresno during the month of August, 1892.

Some time in the spring I had a conversation with Mrs. McWhirter in which she said: "I don't know what to think of Mr. McWhirter, he is always talking as if something should happen him, what I was to do," and she says, "It makes me feel quite badly."

We were over at Mr. McWhirter's house one evening, and Mr. McWhirter came in with his tomares and we were sitting at the table eating them, and he went on talking about living and having a good time, and enjoying one's self and spending money freely and so on, and he said to his wife laughingly, "Nannie thinks she is quite saving; she goes out occasionally in the kitchen and saves a little and thinks she is quite economizing," and she jumped up and says: "You know we are saving." He says: "I don't know; we always have a good time, think nothing of spending a hundred dollars any day. We always have a nice box at the theatre, and carriages and so on." Talking in that manner—rather an extravagant manner—he says: "I don't know how to keep this thing going. I am just trusting to a ticket in the Louisiana Lottery."

In a conversation that occurred in October Mrs. McWhirter told me that Mr. McWhirter had remained home quite closely on the Sunday previous to his death; seemed to prefer spending the day with her and the baby.

Q. What, if anything, did she say to you about being affectionate—particularly upon that day?

Mr. Thompson—We object to the question, if your Honor please, as being suggestive and leading.

The Court—Yes, that is a leading question, Mr. Campbell. Ask her what she said, but do not suggest.

Mr. Campbell—I take an exception to your Honor's ruling.

The Witness—She told me how they spent Sunday, and how he preferred to remain home with her. He first suggested that they take the baby and go to church, that he was quite old enough to begin going to church. She says, "No, we never could manage him in church." Then they decided they would go, and company came in and church hour passed, and they did not go; she told me they sat out under their trees—they sat under their umbrella tree, and she says, "We need some slop cans, Mr. McWhirter, and could not we fix some?" He said, "Yes, get them and fix them now," and she says, "No, wait until to-morrow," and he says, "No, fix them now, something might occur that we might not get them fixed," and she went and got the cans as he told her, and he pulled something from his pocket and he said, "By the way Nannie, this is something we ought to have had in the mountains." It was either a carpenter or blacksmith shop all in one, I don't know which one, and they fixed the cans, and sat out under the tree together, and they talked over about what they had been reading about that day, and the day passed on—the dinner hour and evening came on. That was about all she told me in regard to that day.

In one of her conversations after the 12th of October, 1892, she spoke about what he said in respect to the child; how he should be educated; how he wanted him carried through good schools and given a good education, and raised to be strictly honorable—honest in all his dealings.

She was talking one day, and she said to me, "Mrs. Lane, you know he left me a letter telling me to bear up under it, if anything should happen, not to give way to grief, because she says, "You know it would kill me, and to live for their child's sake. She said "Don't mention this, Mrs. Lane," and I said, "Certainly not, Mrs. McWhirter."

CROSS-EXAMINATION.

This conversation about the theatre boxes and carriages was spoken in a laughing way.

I always thought Mr. McWhirter was very much attached to his wife and his child, and I always found him of cheerful habit and disposition. Never found any manifestations of melancholy or of mental distress, or anything of that kind about him.

Mrs. L. R. Williams, a witness sworn on behalf of the defendant, testified as follows:

I know Mr. and Mrs. McWhirter, and lived near them on L street for two years. I was at their house between 10 and 12 o'clock on the day of Mr. McWhirter's death, and she said that on the day previous to his death he told her how he would want the house fixed, and how his plans would be, and how he should like to have it done, and how he would like to have her do, if anything should happen to him, and also about educating the boy—he told how he wanted it done, and seemed to impress upon her mind thoroughly as to how he wanted the boy educated if anything should happen to him. She said he repeated it several times to her how he wanted the boy educated. She said he

talked that day as he never had before, to her, and she spoke mostly of the boy. She said that he told her he wanted her to send him East to be educated, and then afterwards to Europe for three years, that these were his plans if anything should happen to him, that was the way he wanted him educated. She said she undressed the boy for bed as usual and he went out and kissed his father good night, that he was sitting on the front porch, and she started in with him, and he jumped up and said "Give me one more kiss," and he grabbed her and kissed her several times, as though he could not let her go, and felt as though something was going to happen.

Q. Will you please state what, if anything, Mrs. McWhirter said at that conversation, in relation to Mr. McWhirter's presentiments, if anything.

A. She kept repeating all the time as she was lying on the lounge, "Oh, he knew it, he knew something was going to happen to him that night."

CROSS-EXAMINATION.

This occurred on the day of the death of Mr. McWhirter. I asked her if she knew who did it, and she did not answer. She seemed to be in very great distress, and was talking in an incoherent, disconnected way.

Q. Did she send for you that day, or did you voluntarily go over there?

A. I voluntarily went over there.

Mr. McWhirter's manner towards his child was always very affectionate.

RE-DIRECT EXAMINATION.

When I lived in the house adjoining Mrs. McWhirter's there was a large osage orange tree in front of my house that was dug up and thrown in our back yard, and these trees were left in the yard when we moved away. It had been dug up six months or eight before I moved away.

Mrs. Alice Linforth, a witness sworn on behalf of the defendant, testified as follows:

I knew Mr. McWhirter in his lifetime, but was not an intimate friend. After my marriage, Mrs. McWhirter and I visited as friends, as we always had done. I went to Mrs. McWhirter's house on the day of the death of Mr. McWhirter, between the hours of nine and ten o'clock, if I remember. Mrs. McWhirter spoke to me in regard to how unusually affectionate he seemed on the Sunday; that he had been with her during the day; and how he had talked with her in regard to plans to carry out with the boy, if anything should happen to him, if he did not live to raise the boy.

She did not say to me what the plans were to do with the child any more than to put him in one school, and keep him there and not change schools with him. She did not say to me what school that was or anything of that kind.

She said that when he kissed the little boy good night that he clung to him and kissed him over and over again, seemed as though he could not leave him, as though he had a presentiment that something would happen to him. That is all I know.

CROSS-EXAMINATION.

I went to Mrs. McWhirter's that Monday morning of my own volition and without invitation from anybody. I went as a friend of Mrs. McWhirter's. When I went in she seemed pretty much composed. She cried while I was there, and was very much distressed. I suppose I remained there an hour. I don't think any longer than that.

L. F. Winchell, a witness sworn on behalf of the defendant, testified as follows:

I know Mrs. McWhirter by sight only, but knew Mr. McWhirter very well. On the morning of the death of Mr. McWhirter I was awakened about four o'clock by George Rupert and Charles Packard. I did not hear the shots. When I first got there I went into the alley-way through the opening in the fence. Officers Welch and Babcock had the pistols and clubs. I examined the pistols and found that there were three chambers empty in each, and that both were loaded with short cartridges. I also saw the clubs and mask.

We examined tracks in the yard and in the alley. There were numerous tracks. The ones dwelt upon mostly were supposed to be moccasins or heelless shoe tracks. (This represents the alley.) At first I only followed the tracks as far as Calaveras street, and Mr. White was with me and walked out. I went back to the yard, and he returned shortly afterwards and then we followed them down. I followed them across the street and found the tracks continuing on the south side of Calaveras street. There were two tracks. There was a woman's track that seemed to be accompanying this other track—two tracks that seemed to

accompany each other. It had the tracks like I have seen made by a woman's shoe. We lost them in the rear of Guitano's. I followed them down Stanislaus street and across into the other alley, and also either way on Stanislaus street. I found no tracks south of Guitano's and none on Stanislaus street. In making my examination I scrutinized the ground closely. When we had traced the tracks as far as Guitano's the tracks stopped. South of Guitano's I examined the alley from one side to the other, and across Stanislaus street into the mouth of the alley, and found no tracks there.

The soil of the street was loose, on the sidewalk it was loose in places, a little dust, but generally pretty hard.

I did not find a single track south of Guitano's corresponding in any manner to the tracks that I found leading from the alley to Guitano's, or any indication of any.

I also examined the bullet holes in the closet and in the fence. These three shots could have been fired from one pistol, the one in the back of the closet, and the other in the cope of the roof, and the other through the lower portion of the fence.

Mr. Budd—Q. Did you put anything in these holes to discover the exact angle?

A. I did, the one in the fence only, and the other one I guided with my eye.

Q. How do you mean guided with your eye?

A. I took the position to get the angle of the shots in the board in the yard, and by moving from one place to another I got the angle of those shots. They

all came to me in the same position, and if I moved out of that position, they would not come to that point.

The shot or hole that went through the fence was specked with powder. I noticed some other bullet holes in the alley fence of McWhirter's, fifteen or sixteen feet north of the opening in the fence. They were about four feet apart, and I also found two holes in the Clark fence across the alley, and I found that those holes came from one point. I can prove that they had been fired from one point. I moved around and back and forth until I could see through the holes in the fence, and they seemed to diverge from one point.

I examined the rope first that was on one of the clubs, and the manner in which it was put on, and the ends of it that were cut. The rope was wrapped around the club, and it was tacked on with a brad. It was an old nail. I know I took the rope off to compare it with some other rope, but the nails were not driven in to any great depth. It stuck out considerably. I took the rope off to compare it with the end of some clothes line that hung in the north end of the lattice work, and I found they were both the same kind of cotton rope. One end of the rope had been cut clean, like as if made with one stroke of a knife—not square across, but diagonally across the rope. The other end, if anything, had been cut with two strokes. It had a little jog in the end of it like. I also examined the rope on McWhirter's clothes line, and took some of it down, and it was the same kind of rope. I mean to say there was a jog on the rope that I found

in the club, and also a jog in the rope that I found in the yard on McWhirter's fence. The rope that was cut from the fence corresponded with the end of the rope that was taken off the club.

Q. Did they jog in, or how?

A. Yes, sir; they met there perfectly, and I examined particularly the one with the ragged cut. The ends were fresh and solid then.

Exhibit 7, People vs. Heath, resembles the club very much. It was jagged at one end, and had an old end on it, which was black. I examined the other end of it, and where it was sawed on both of them. I know it was sawed both ways, and the sawing was rough in two different directions. I noticed that particularly. I also made an examination for other bullet holes on the fences in the inner part of the yard, the back of the office and the back of the house, and the lattice work, but found none.

I made this examination on the day of the morning on which McWhirter was killed.

I was in charge there all day. Mr. Hensley, the sheriff, sent me up there, after I reported to him, to take charge of the yard, and keep intruders out and protect the family.

I never made an examination on the inside of that chicken yard.

CROSS-EXAMINATION.

The tracks of which I spoke I examined by the light of day. I think the heelless shoe was the larger. The woman's track had a heel on it.

I was one of Mr. Hensley's deputies during a portion of his last term, and held office under him to the date of the expiration of his term.

The tracks of the heelless shoe and the heeled shoe went north and came back south. There were other tracks coming into the alley—in fact, my own and Mr. Packard's came into the alley.

When I arrived on the McWhirter premises there were very few in the rear portion of the yard. Mrs. McWhirter came out, and I spoke to her about some things. There were quite a number near the front yard and about there. That is where I met Officers Welsh and Babcock, and there were several around them.

In the alley there was but one set of tracks, apparently made by a heelless shoe.

J. A. Lane, a witness sworn on behalf of the defense, testified as follows:

In 1892, I lived about 37 feet from him, and had always been very friendly with him and his wife.

I was not in Fresno at the time of his death, and did not return to Fresno until about the middle of October. Some time in April, I think, 1892, I drove up to where Mr. McWhirter lived, and he asked me if I had time to take him to the cartridge works, he had some business there, and he got in the buggy and we talked about things generally, and I brought him to Mariposa street, where his office was, and he said he wished to talk to me a little bit before he got out of the buggy, and which is the time he made his statement. He told me he had been taking out some insurance policies, I

think he said they amounted to something like \$40,000, or \$50,000, and he went on to say that he wanted to make a statement to me about this, and that he was being examined for more then. He said he expected to take quite an active part in our county politics, and that he expected also to be a contributor to the press during this campaign, I understood him, and that he had taken out these life insurance policies as a protection to his family. He said he expected to be killed during the campaign, and he further said to me—explained to me the reason he made this statement to me was that in the event of the insurance companies not wanting to pay his policies, that he wanted me to be a witness against them in Mrs. McWhirter's behalf, and he stated further that he had told the insurance companies that they were taking an unusual risk, that he had stated to them about this danger that he felt he was in.

CROSS-EXAMINATION.

I think Mr. McWhirter referred to local politics, but whether to city or county, I do not know.

Dr. J. C. Cooper, a witness sworn on behalf of the defense, testified as follows:

I am a dentist, and have lived in Fresno for the past fourteen years. I knew Mr. McWhirter some 2, 3, or 4 years before he died. At the time of the shooting I was at my residence, which is about a block and a half from his house.

I heard five or six shots. I don't know exactly how many it was. I should say I do not think there were over six or under five. I was awake at the time, and

all the windows in my bedroom were open, and pointed toward Mr. McWhirter's house. I was up when I heard the shots. They came one, or two or three at a time, and then a little interval, then one, two or three more. I heard the screaming when the shooting was about half over—in the midst of the shooting. Between five and ten minutes after I heard the shooting I got out of the house, and went to the McWhirter residence with Mr. Rorer through the alley, crawling through the fence where a couple of boards had been knocked off. There was nobody in the backyard when we got there. They had carried Mr. McWhirter up on the porch and just taken him in. I went into the house and saw several men there, and Mrs. McWhirter. I remained there until Dr. Pedlar came in, it might have been five or ten minutes. Before I left the McWhirter residence there was quite a number of people who came in. I remember meeting, as I was leaving, Officer Babcock and another officer with him, going toward the McWhirter premises. After sun up that morning I returned to the McWhirter residence, where I saw Mr. Baker, Mrs. McWhirter and Mr. Lee Blasingame.

(Witness temporarily withdrawn.)

Lee A. Blasingame, a witness sworn for the defendant, testified as follows:

I reside in Fresno County and am a brother of Mrs. McWhirter. On the Friday previous to his death Mr. McWhirter did not come to me and say: "Lee, if anything happens to me, I want you to take care of my little boy." He never made that remark.

At the Blasingame ranch, as Mr. McWhirter and his family were moving out of the mountains, he stopped there to change horses and get his dinner or lunch, he remarked, "Is not that a grand boy, the smartest boy in the United States," or something to that effect. "I am going to make a United States Senator out of him," or something of that kind. I cannot give you the exact conversation. He says: "I want you to look after him if ever—if ever we have to travel, or if we travel, I want you to go with us," or something to that effect.

I reached Mr. McWhirter's house on the morning of his death at about half past seven. I do not remember seeing Dr. Hooper there. At that time in the backyard of Mr. McWhirter's premises, I did not say to Dr. Hooper or in his presence, "Poor Mac, poor Mac, it was only last Friday that he asked me to take care of his little boy if anything happened to him."

CROSS-EXAMINATION.

I did not see McWhirter on the Friday previous to his death. I saw him on Tuesday or Wednesday of that week. I think we spoke.

Dr. Cooper, re-called, testified as follows:

On my return to the McWhirter house on that Monday morning I saw Mr. Lee Blasingame there. Out in the yard between the office and back door, Mr. McWhirter's little boy came out, and Mr. Blasingame said: "Poor Mac, Poor Mac, he only told me last week if anything happened to him to look out for his boy."

CROSS-EXAMINATION.

I could not say whether he mentioned any day of the week or not. I think he said Friday, I am not sure.

I did not count the shots. I just passed it over in my mind. It seems to me the screaming began about the third shot. I heard nothing but the shots and the scream. I state upon my oath that there were not less than five shots, and am equally positive that there were not more than six. There might have been seven or eight, I could not say. I think there were only six.

RE-DIRECT EXAMINATION.

Six is my best impression, as I remember it.

J. D. Morgan, a witness sworn on behalf of the defense, testified as follows:

I am now and was at the time of Mr. McWhirter's death, City Marshal of the City of Fresno. I knew Mr. McWhirter and his folks very well. I went to his place about 8 o'clock on the morning of the shooting. I saw three bullets through the alley fence and some through the water closet. One of them was just to the left of an opening that was in the alley fence, just a few feet from the closet, and ranged rather downward. There were two bullet-holes in the closet. I did not find any others.

At another time I went into the chicken yard with Mr. Bury, the detective, who was representing the citizens of the county at the time.

I went into what is called the hen's nest on that map with Mr. Bury several days after the death of Mr.

McWhirter. Those chicken nests are probably $2\frac{1}{2}$ feet from the ground. We found some saw marks on one of the boxes and some sawdust on one of the bins. The saw marks were made across the boxes rather diagonally crossing over the bins, and the sawdust was partly on top of the bins and partly down in the bins. I put the sawdust in an envelope and took it down to the District Attorney's office and gave it to Mr. Welch.

R. L. Rader, a witness sworn on behalf of the defendant, testified as follows:

I have lived in Fresno for the past seven years. I knew Mr. and Mrs. McWhirter. In August, 1892, I was rooming with Dr. Cooper. I would not be positive. but I think I heard five or six shots on that morning, I counted up to four, but after that I did not, but I think there was one or two shots after I stopped counting them—one or two after I counted four. Between the third and fourth shots there was a slight interval. I did not hear any other noise. I heard nothing but the shots. A noise in my house waked me first, and I was awake when the shooting began. I afterward dressed myself and went to McWhirter's with Dr. Cooper, and when we got as far as Clark's Mr. Eastwood was standing out in the yard and said that McWhirter had been murdered. We then went up the alley and tried to open the gate but could not, and we then went through the fence where the boards were knocked off. I wear a 9 shoe. When we went through this aperture in the fence there was no one in the back yard. I went into the

McWhirter house and saw Mr. McWhirter there. There were several people there. I stayed a very short time, and returned the way I came except that I went out the front gate. I did not go back through the alley. As I was leaving I met Dr. Pedlar and Mr. Davidson just at the door, and just outside the gate I met the policemen. From the time I heard the first shot until I met the policemen, was, I should judge, about 10 or 15 minutes.

CROSS-EXAMINATION.

When Dr. Cooper came into my room the shooting had stopped. After Dr. Cooper came into my room he opened up the door, and in opening up the door, his door was open and the windows were up, and I could hear the screams, and I went into Dr. Cooper's rooms, and then went back into my room to finish dressing. Dr. Cooper came into my room before I went into his. I counted the shots mentally.

RE-DIRECT-EXAMINATION.

I did not hear any screams from my room. When I went into Dr. Cooper's rooms I heard the screams.

E. M. Davison—A witness called for the defense, testified as follows:

. I have lived in Fresno for the past six years, and on the night that Mr. McWhirter was killed I lived on Calaveras and L streets, across from Mr. McWhirter's, and south from Mr. McWhirter's. My room fronts on L street, right opposite McWhirter's. I knew McWhirter very well.

The night he was killed I heard six shots fired. I was awake when the shooting commenced. My window was open. As soon as I heard the first shot I jumped right out of bed. Immediately afterward it was followed by two more shots, and then probably there was an interval of a second or two, and then I heard three more shots fired. After the third shot I heard a woman scream, and after the three last shots a woman helloed "Mr. Davison! Mr. Davison!" Of course I did not know who it was. My wife was awake at the time, and said that it was Mrs. McWhirter's voice. I ran across the street, jumped over the fence and went around on the south, and there in the back yard I saw a person lying on the ground and a woman bending over him. I think he was lying in a northwestern direction with his feet toward the house, and his head the other way. When I got there I thought I recognized a man standing back of where McWhirter's head lay. I could not swear who it was, but I afterwards learned it was Tom Rhodes, Clark's man. As soon as I saw what was the matter I went to Dr. Pedlar's office, and found that the doctor had just gone. I then went back to the house, and when I got there there was quite a number of people present, and I suppose they had carried McWhirter into the house, and only stayed a few minutes. Then I went back home and dressed myself and came back afterwards.

When I got back there were a good many people there, out in the alley and in the yard and everywhere. There was quite a crowd there.

Q. Did you hear any other noise, Mr. Davison, on that night, except the six shots and the screaming of the woman?

A. Not that I know of. I did not hear any quarreling in the back yard or anything like that.

CROSS-EXAMINATION.

I was in bed when I heard the first shot, then I heard two more shots, then a scream or a groan or something. I could not say what it was. Then I heard the more shots. Then I heard a woman hello "Oh, Mr. Davidson, Mr. Davidson!"

The head of the deceased was lying further north than south, and I think he was lying on his back. I should say my house is about 280 feet from the post in Mr. McWhirter's back yard.

Albert Riley, a witness sworn on behalf of the defense, testified as follows:

On the night of the killing, I resided about two blocks from the McWhirter residence. I was awake that morning. I am unable to say I was awake when the first shot was fired or not. I counted six shots. I just awakened, counted the shots, listened to see if I could hear anything else. I did not hear anything else. I did not hear the screaming, or anything beside the shots.

CROSS EXAMINATION.

I don't know whether I was awake when the first shot was fired or not.

P. G. Farley, a witness sworn on behalf of the defense, testified as follows:

I have lived in Fresno for the last four, five or six years. I think about five years, and on the night of the killing of Mr. McWhirter was a night watchman at the engine-house barn, which is about half a mile, more or less, from the McWhirter residence. I was awake and heard the shots. I can't say that I counted them. I think, if I remember right, the shots came something like this—two shots, then there was an interval between them; and in regard to the balance of the shots—I might be mistaken, and then I might not—I thought there were four afterwards. Whether there was more or less I would not be willing to swear to. Then I heard the screaming and some one hello murder.

CROSS-EXAMINATION.

The voice that hollowed murder seemed to me to be a woman's voice.

Mrs. Nelson, a witness sworn on behalf of the defendant, testified as follows:

Before I was married my name was Meta Peterson, and I lived at Mrs. McWhirter's, and resided in Fresno county about six months before the death of Mr. McWhirter, and lived with Mrs. McWhirter five months before his death and three months after it. I went to Tennessee with Mrs. McWhirter after Mr. McWhirter's death.

Mrs. McWhirter and I are intimate friends.

The day before his death I was in the house in the morning, but went out in the afternoon. We had dinner on that day about two o'clock. After dinner I went down town and came back about nine o'clock.

When I got back, Mr. and Mrs. McWhirter were there. He had been down town to get some tomares, and got back just as I got home. It was about nine o'clock when I got home, and I then went to my room.

Mrs. McWhirter set the lunch herself that evening. McWhirter threw the tomares away out in the chicken yard and came right back. When he went to throw them away I was in the kitchen, and I think Mrs. McWhirter was in the dining room. H was gone a few minutes. He then went down in the cellar to get some butter, and he asked me to get him the ice pick, which I did. After I got him the ice pick I went to that room (showing on map) marked "Meta's bedroom," which is correctly represented on that map. There are two windows in that room. The bed is marked as it was in my room. I think I went to bed that evening about half-past nine, and went to sleep immediately.

I slept a little while when I was awakened by some noise. I don't know what kind of a noise it was. I then went to sleep again and was awakened at the time of the shooting. I was in bed when I heard the first shot. I heard three shots in all--they were the last three that were fired.

After hearing the first shot I looked out of my window right at the head of the bed. The window looked out into the back yard. I saw two flashes, which came from the back yard. I could not see anything except the flashes. I could not see any of the objects in the yard. I saw nothing but the flashes.

I did not see or hear any person run away, and did not hear anything between the first shot and the other

two shots. Mrs. McWhirter was in the dining-room when the last shot I heard was fired, and she then went out of the house. There was one screen door and one other door from the dining-room out into the back porch. They were fastened with a hook, and were hard to open. I saw her go down the steps a short minute after the last shot.

At the time I saw the two flashes, I saw none of the objects in the yard. After Mrs. McWhirter found Mr. McWhirter she called me, and I went right out. I put on one dress, and ran out there in my bare feet. When I got out there Mrs. McWhirter was screaming. I asked her what was the matter, and she said "Some one has murdered my husband." She sat down and took his head in her lap, and told me to run for the doctor. I ran to Mrs. Southwood, for I did not know where the doctor lived.

When I got out there, Mr. McWhirter's head was toward the chicken fence, about four feet from it.

I did not hear the door-bell of Mr. McWhirter's house ring before I heard the shots, and did not hear any one go out of the house, or walk around the house.

When I saw these flashes, I heard two reports, and some one groan after the last shot.

I did not hear any person run away or get over the fence, and did not hear any other noise except the groan.

I won't swear that I saw anything fall. I did not remember the occurrence better the Monday after the death than I do now. I remember it all now.

On the morning after Mr. McWhirter died, I remember telling Mrs. Judge Crichton, out in the back yard, that I thought I saw something fall.

Q. Did you at that time believe you saw something fall?

A. I was so excited, and after I thought over it I thought I had seen nothing.

I talked with Mr. Welch and two other gentlemen, I don't remember when, but I think Mrs. McWhirter was present. I don't think I told Mr. Welch that I saw Mr. McWhirter fall.

CROSS-EXAMINATION.

At the time of Mr. McWhirter's death I had been in the United States six months, and did not understand the English language very well, and do not understand it very well yet. I did not understand it as well then as I do now.

When I testified at the coronor's inquest and at the Heath trial I had an interpreter.

When Mr. McWhirter went out to throw the tomales away I think he was out about one minute. He came back right away—just about long enough for him to walk to the back fence and back again.

The noise I heard the first time I awoke seemed to be in the alley. Then I went to sleep again, and I don't know what awakened me the second time. I raised my head up and looked out the window and saw two flashes. The flashes were toward the house. I could not see any object in the yard at all.

In going out from Mrs. McWhirter's bedroom she would have to go out this door in the dining-room, and then out that door onto the porch, and then

through a screen door here to these steps, and then go out into the yard (showing on diagram). In going out, I went out this door from my bedroom into the little hallway, then out the screen door and down the back steps from the kitchen. Before leaving my bedroom I looked out this other window that looks out onto the side steps. I do not remember whether or not I heard Mrs. McWhirter scream before she left the house. I know I heard her scream. The screaming commenced after the last —

Mrs. McWhirter did not stop to dress. She went out in her night clothes. I went out as quick as I could after she went out, only stopping to throw my dress over me.

When I am in my room I cannot hear the door bell ring unless it rings very loud.

In the conversation with Mrs. Crichton and Mr. Welch, I did not understand every word they said to me, and I could not talk very good English in reply. When I was talking to Mr. Welch I do not remember whether Mrs. McWhirter was present or not, and I do not remember whether she took any part in or paid any attention to the conversation.

RE-DIRECT.

The night that Mr. McWhirter was killed was not a very hot night.

The windows were down, and I looked through the glass window. The flashes came from the same place in the yard.

Mrs. W. D. Crichton, a witness sworn on behalf of the defendant, testified as follows:

On the morning of Mr. McWhirter's death, I saw Meta Peterson in the kitchen of Mrs. McWhirter's washing some garments. I had a conversation at that time in relation to what she had seen.

Mr. Campbell--Q. What, if anything, did she tell you at that time and place in relation to what she had seen.

Mr. Thornton--We now renew the objection on the ground that it is an impeachment of their own witness, and that the matter is collateral and immaterial, and that nothing she could have said could possibly bind us.

E. E. Brown, a witness produced on behalf of the defendant, testified as follows:

I reside in Selma, Fresno County, Cal., and last term was Coroner of Fresno County, and was such at the time of the killing of Louis B. McWhirter, and held an inquest on his body. I think it was on the 10th of September, 1892, that I went with the coroner's jury to view the premises. That was the day of the verdict. At the premises I saw a board with a bullet in it. The board was in the corner of the chicken yard, a board about 18 inches or two feet long and a foot wide. I think it was Mr. Thornton that called my attention to it, and I think at his request the board was removed. I think the board was part of the base board or put in to stop up a hole. I removed the bullet in the presence of the coroner's jury. I also saw two or three holes in the sack. I do not remember how many sacks were there on the south side of the chicken yard at that time. I think there was a number of small holes in that sack

at the time. I saw one hole that went entirely through the sacks. The board and sack were sent to the sheriff's office by Officer Babcock. I have never seen them since. I do not think they were among the other exhibits that were marked for preservation by Mr. Welch at the coroner's inquest. After we got through with looking at the exhibits they were sent to the Sheriff or District Attorney's office—I don't remember which. I kept the bullet and produced it at the trial of *People vs. Heath*.

There was part of a bullet found in the fence above the chicken coop, some place in the fence there. I don't remember the exact location.

I think there was some objection at first to the removal of that board and that sack, but afterwards it was decided to remove them. I don't know who offered the objection. I think the objection was made because they wanted to make some measurements. The measurements were made. The bullet was lengthwise in the board, and had not penetrated very deep in the board. It looked as if it had been there quite a while.

CROSS-EXAMINATION.

I don't know whether the bullet hole through the sack was a bullet hole or not. The hole on the south side of the double thickness of the sack was larger. I don't remember the size of it. I did not pay particular attention to it. Some one there had a lens or magnifying glass, and I looked at the largest of the holes through the glass.

I think the size of the hole on the north side of the sack was smaller, and it was a little lower down than the other. There was not a great difference.

The board was common mountain pine about an inch in thickness, 18 inches or two feet long and one foot in width. In order to see the bullet in the board you had to stoop down because there was a rail at the bottom of the fence—a 2 x 4 stringer. I don't think the bottom of the stringer was over a foot from the ground. The bullet splintered the board a little, having gone in at an angle and raised a splinter. The length of the bullet was parallel with the board. The bullet was, I think, in about the center of the board. The rip, or scar, or splinter was half an inch long, and maybe three-quarters.. Under the splinter the color of the board looked fresher than the remainder. It did not look like a fresh splinter, though. The color of the bullet was rather dark. It was not bright like it is now.

I could not say that Mr. Thornton objected to taking that gunnysack off that fence, although I think he objected until some measurements were made. There was some one objected, and after they used the tape-line they did not make any more objections.

I know Mr. Thomas Bury, but I don't remember that he was there on that occasion. I think there were 25 people there at the time. Some one used a tapeline. I don't remember who it was—whether it was Bury or not.

The board was examined by the jury and set down by the fence. One of the jury that examined it started to remove the bullet, and I took the knife and

removed it myself. I saw that it was loose, and took it out. I don't think I looked at that board to exceed twenty minutes in my whole life. I took the board out of the chicken yard, and I think you (Mr. Thornton) took the sack. Outside of the chicken yard I gave them to Officer Babcock. I never saw them after they left that place. The sack was an old, weather-beaten sack. You could not tell much about the holes.

I did not remark the edges. I don't think in an old sack you can tell the difference between fresh holes and old ones. I have no experience in these things, but I don't think you could.

RE-DIRECT-EXAMINATION.

The sack looked as if it had been there over one winter, and it was sent to the sheriff's office for preservation. I don't remember any objection to the board and sack being removed. I took the two bullets down and had them weighed, and never paid any attention to the matter until they were called for in *People vs. Heath*, when I produced them in court and did not see them again until the present time.

H. H. Welch, a witness sworn on behalf of the defendant, testified as follows:

I reside in Fresno, and am an attorney-at-law. I was the deputy district attorney who conducted the coroner's inquest and made investigations as to the death of McWhirter.

I called at the McWhirter residence the day after the funeral. At that time I examined the water closet

also the fence and the hole in the back fence, and some parts of the woodshed and stable, or whatever it may be, in the other part of the yard, also the clothes pole, and things around there in general in the back part of the yard.

With reference to the bullet-holes, I first found three bullet-holes in the closet. The first hole I noticed was the one through the back part of the closet, about the center of the closet. I found it almost entering in the center of the door. I opened the door in such a way as to place myself in front of the hole. I put a pencil in and took a range. The range was about probably ten degrees upward from the level. I examined the other one in that corner of the closet, and another one which was in the back fence, and put pencil in the three holes, and then placed myself where I could get the range of a man firing, and the three holes came to the same point. I also put a pencil in the holes and got a range across the alleyway, and they seemed to have crossed the alleyway. All the shots were from the inside, out.

I also saw the place where the boards had been knocked off. I did not make any other examination of the premises for any other mark. I found the clothes line on the lattice work. I just examined the end of the clothes lines, and I think before we left the premises that I had a piece of the clothes line taken to the office. I did not examine the end of the clothes line. I examined the clothes line around the club for the purpose of comparing the two. I went to the clothes pole where the body had fallen, and examined that, and made some measurements and other dis-

tances and other things. We were called into the house about the time we got there. We went into the house. Sheriff Hensley and Mr. Bury were with me. I think Mr. Bury was working for the county then. There was about \$25,000 reward offered at that time for the person who committed the deed. Mr. Bury was first employed by the citizens. We desired to employ a detective. I spoke to Mr. Thacker and Mr. Hume, who both recommended Mr. Bury. I then spoke to the Supervisors, and they told me to make any arrangements I could with Mr. Bury, which I did.

When I went into the house I found Mrs. McWhirter and a brother of Mrs. McWhirter's, a young boy about 13 or 14, and her little son. They were all in the dining-room. After having a conversation with Mrs. McWhirter the servant girl was called in.

There was a conversation held with the servant girl in the presence of Mr. Bury and Mr. Hensley and myself. There was a conversation occurred by questions being asked by all of us. There were a great many questions asked by Mrs. McWhirter.

Q. Was any statement made by the servant girl as to what she saw when she looked out at the back window?

A. Yes, sir.

Q. Please state to the jury what it was she stated she saw at that time and in the same presence.

Mr Thornton—We renew the objection.

The Court—I am very clearly of the opinion that in cases of this kind impeachment is not permissible. The objection will be sustained.

Mr. Campbell—Note an exception.

Mr. Budd—Q. Did she at the time and at the place mentioned, and in the presence of the persons stated, tell you that she had looked out of the window and at the last shot seen Mr. McWhirter fall?

Mr. Thornton—Same objection.

The Court—Objection sustained and exception.

Mr. Budd—Q. Did she at that time and in the presence of the Sheriff of the county, and Thomas Bury and Mrs. McWhirter state to you that she looked out of the window, and that she saw something white fall, and heard nobody run away, and no noises?

Mr. Thornton—Same objection.

Objection sustained and defendant excepts.

The Witness—After we came out of the house we went into the northeastern end of the yard where the outhouses are through sheds, and things like that. I mean in the chicken yard.

We simply passed through the sheds, looking at different sheds, at the gates, and things of that sort there, and we found some nails, I think, in this part of the shed, here in some boxes, or tin cans, or something of that sort.

I think in a shelf they had there in the chicken house in that place where the chicken nest was, and we also found a saw in there. I don't remember whether the saw was hanging up or whether it was across some boxes. Some of the nails were afterward taken out and marked as exhibits before the coroner's jury. They were similar in size and age to the nails which you hand me, but it seems to me there were more shingle nails than there are here. We took away about half a handful with us, and a number of the nails were put in as exhibits at the coroner's inquest.

I also saw the nail in the club found at McWhirter's. I think it was similar to the nail with the mark around it. I remember it as being one of those square-pointed shingle nails. I think at the coroner's inquest, when the nail was introduced in evidence, it came out of the club, and if I remember right I put a string around it to distinguish it from the other nails.

(Remainder of nails offered and admitted in evidence.)

The Witness—I remember that these small nails were very much rusted from exposure. They apparently had been very wet. The condition of rust on those nails and on the nail found in the club was very similar.

The saw we found in McWhirter's back yard was very similar to the saw which you show me. This may be the one. It has my initials on it, which I put on at the time of the coroner's inquest. The teeth of the saw we brought back from the house were covered with a woody substance, woody fibre—that is, inside of the teeth had some sawdust in them—it was not sawdust, it was wood fastened onto the inside of the teeth of the saw like cheese along the blade of the knife with which it was cut. It was not on the blade of the saw, but was in the teeth. I took the saw at the time and handed it over to Mr. Hensley and told him to keep it with the other exhibits. I marked it at the coroner's inquest, and after I deposited it in the treasurer's office when the coroner's inquest was completed. I have never seen the saw since. The saw is

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not in the same condition now as it was then; the teeth have not got that woody matter inside of them, the teeth now being apparently clean. If this is the saw that I brought back, I was present when we called in an expert carpenter, Mr. Davis, in the courthouse yard. He was the foreman of the courthouse. I was present when he made an experiment with the clubs to determine whether the cut on the clubs could have been made with that saw or not, and whether the jagged tooth would show. There was at that time a very perceptible jag in one of the teeth. I do not notice it now.

Q. Mr. Welch, we were so unfortunate to break the vials the other day. I will ask you to look at the corks of these vials. Did you cork up any of the sawdust?

A. Yes, sir. Some was in my office. Mr. Morgan and Mr. Bury brought me some sawdust which I put in a bottle. I don't remember whether it was the larger or the smaller bottle. I don't remember whether any of the sawdust in the teeth of the saw was put in the vial. That sawdust was saved, but whether it was put in the vials or not I could not say. I don't think the sawdust was introduced in evidence at the coroner's inquest. They were not opened. I could not say that one of these vials contains the sawdust that was taken from the teeth. I know that one of them contained the sawdust brought to me by Mr. Morgan or Mr. Bury. The sawdust with the chicken feather in is the sawdust brought to me by them.

The color of the sawdust that came out of that saw I compared it with the sawdust that Mr. Davis made

from the osage orange clubs, and it was similar in color. (Saw offered in evidence, and marked.....) After the examination and when the coroner's jury went down to visit the premises, I took the exhibits, marked them and took them down to the treasurer's office. I was never asked to place in the exhibits any board or gunny bag. Those are the clubs that were there. I have got my marks on them both.

With reference to the mask, the first time it came into my hands was the time of the coroner's inquest. I think I had seen the mask in the sheriff's office before, but at that time it was tied around this hole. I placed it on my head and it dropped right over it. At that time I untied the knot in this string, and there dropped out a sliver of cloth—a small piece of cloth that was in the folds of the cloth in which the knot was tied, inside of the knot, and when I opened the knot this dropped on the floor right before the jury. I did not tie it back. I left it open.

CROSS EXAMINATION.

I first met Mr. McWhirter in 1888. We were always friendly. The last time I talked to him was when the case of Perrin Brothers was dismissed in the Superior Court. I think that was some two or three months before his death. It was a criminal prosecution, and the matter grew out of some money that Mr. McWhirter loaned the Perrin Brothers there in Fresno, and he was the complaining witness. He had them arrested.

I visited the premises for the first time after the death of Mr. McWhirter on the afternoon of the

day after the funeral, about two o'clock. My recollection is that at that time I gave a piece of the clothes line hanging on the lattice work to Mr. Hensley to bring away. I don't know that I can pick out the piece of rope from among those which you show me. I don't know that it was any of those pieces. I know that it was a piece about that size and length—a similar rope. I gave it to Mr. Hensley to bring away, and have never seen it, only at the coroner's inquest. Mr. Hensley, Mr. Bury and yourself were present when I obtained the rope. That was the only time I was ever there with Mr. Hensley.

The subject of the correspondence of the ends of any piece of rope which I found with any piece of rope hanging upon the lattice work was not called to my attention.

I do not remember how many pieces of rope I saw, or which were placed in my official custody as exhibits in connection with the coroner's inquest.

Reading the testimony at the coroner's inquest now indicated that I put tags upon those pieces of rope when I put them away. I put them in evidence, and these tags were placed there for the purpose of showing where they came from, or to identify them. If the tags were on the ropes now, I would probably be able to identify them. But they are not on there now.

My recollection is that the teeth out of place in that saw which we took from the McWhirter premises was in the center of the saw. I see nothing in the saw which you hand me to indicate that a tooth is out of line. I cannot see the slightest trace of hammer or file or rectification of the teeth

of that saw. The teeth show on one side that they have been set, but as to when I could not state. Every other tooth on the left hand of the saw, the teeth being held upward, would show a mark as to being set, and that is uniform.

I went to those premises the day after the funeral, which I know was some days after his death, but I don't know the day of the month or the day of the week. If he was buried on the 31st, I went there on the 1st.

I never noticed any osage orange until I saw those clubs. I have no knowledge of the qualities or physical appearance of sawdust made of osage orange timber. I never saw any until I saw it in my office. I could distinguish osage orange sawdust from pine or redwood. I could tell it was a different wood from mahogany or redwood. I could not tell the difference between osage orange sawdust and sawdust made by sawing a lemon or peach tree.

We had what we knew to be osage orange wood and we took the sawdust which Mr. Davis made and the sawdust which Mr. Morgan and Mr. Bury brought, and we made the comparison at my office under a microscope. My recollection is that Mr. Davis sawed probably more than enough to cover the point of a knife out of some osage orange wood that was there in the office, which Mr. Bury had brought us.

I think that is the wood or pieces of wood that Mr. Bury had. I think that piece marked J. O. is a piece of wood that Mr. Bury and Mr. Ward brought to my office, some time after Mr. McWhirter's death, after Mr. Bury begun working

on the case. One essential thing was to find out where osage orange wood had been cut, and they brought this to the office.

I think this piece marked Bx—I think both of those pieces were pieces that were brought to my office, or rather, that I saw with Mr. Ward and Mr. Bury.

Some time after Mr. McWhirter's death I learned of a piece of osage orange wood being obtained from the vacant lot north of Mrs. Southworth's house. This was before the coroner's inquest and after Mr. McWhirter's death. I think Mr. Ward and Mr. Bury brought that piece to my office.

I don't know when they obtained it. I know this whole country was searched over for osage orange wood almost immediately after the death, and it may have been obtained then. They had scouts out in every direction to find where osage orange had been cut.

I went with Mr. Thompson and you (Mr. Thornton) to the sheriff's office one day, but I do not recollect that it was Monday, September 5th. I know you came to me and wanted to see some exhibits there, and we went there together, and I think that was the only time we went to the sheriff's office, I don't recollect whether or not that piece marked JO was exhibited to you at that time or not. I knew that you were there, and that you saw the clubs there at that time. I don't know whether you saw anything else besides the clubs or not.

I knew who Mr. Thomas Bury was before McWhirter's death but I did not get acquainted with him to know anything about him until after that. I first came into official relations with Mr. Bury the Monday

or Tuesday after Mr. McWhirter's death. His bill for services rendered was afterward audited and paid by the County of Fresno.

The first I knew of the sawdust was when Mr. Morgan and Mr. Ward brought it to my house, and told me where they obtained it. I think that was on the next day after I was down at the house. I think about Friday, September 2d. I was all through the chicken house myself on the day that I was down there. I did not notice any sawdust then. I only made just a casual and general examination. I did not look at the floor of the chicken house for any purpose. I know nothing on the subject of sawdust being there at all.

I made no examinations of the premises at that time for any bullet holes other than the five I have described. I made no examination of the middle fence. Just saw it, nor of the rear of the fence, nor any part of the office, nor of the rear of the dwelling house. I was there in the yard possibly fifteen minutes before I went into the house, and we may have been in the house probably an hour. My total examination of the exterior premises was from 15 to 20 minutes.

The shot in the peaked roof of the privy, the shot in the rear wall of the privy, and the shot ranging downwards at a point north of where the boards were knocked off the fence must have been fired by a person standing in the same place. Three men at three different times could have done so. I mean that the person who fired the shot through the rear of the privy could have also fired the shot through the fence without making a full about-face.

I knew about the size of a man McWhirter was. I could not say about the length of his arm. I knew he was not a large man.

I have been a surveyor and civil engineer. From the point 9 to the rear of the privy would be about $8\frac{1}{4}$ feet. I have no idea of the length of McWhirter's or of an ordinary man's arm. If McWhirter was standing at point 9, the muzzle of his pistol would probably be an inch or a few inches outside the door. The hole in the fence was powder-marked. I did not notice any powder marks on the others. I think it was about three and a-half feet to four feet from the front of the closet to the rear—to the back wall, and the seat occupied a part of that space.

Q. Now, if the muzzle of the pistol would just have been about even with the door of the water closet, when the person who fired that shot from that point, assuming it to have been fired from that point through the rear wall, how far would the same hand have been from the eaves or the peaked roof?

A. About four feet.

I did not accompany the coroner's jury or the other counsel in the case to the McWhirter premises as the inquest was about concluding. I never saw a gunnysack said to have been brought from the McWhirter residence, nor a board with a bullet mark upon it. I was not in the courtroom after the coroner's jury left there to view the premises, and was not present when they returned their verdict. I never took any instrument for the purpose of measuring the angle of those shots. I took the angle with lead pencils and judged it.

RE-DIRECT EXAMINATION.

The mask was loose enough to drop over my head before I untied it. I wear a $7\frac{1}{4}$ hat.

From statements made before the coroner's inquest was held, one or both of those osage orange sticks came from near Mrs. Southworth's house.

J. J. Norton, a witness sworn on behalf of the defendant, testified as follows:

Have lived in Fresno a little over two years, and am a locomotive engineer, having been employed by the railroad company for the last twelve years in the San Joaquin Valley.

I lived in Fresno for four or five months before the night that McWhirter died.

Witness temporarily withdrawn.

Mrs. Evangeline McIntosh, a witness sworn on behalf of the defendant, testified as follows:

I have resided in Fresno for the past four years, and resided there at the time McWhirter died, about four blocks from his residence and nearly opposite Dr. Deardorff's house.

I was awake that night. The arrival of a nephew whom I had not seen for twenty years on the train that evening, excited me very much, and we stayed up and talked until about midnight, and I did not retire only on a reclining chair. I was excited and did not feel sleepy, but let the children retire and I sat up by the window. It was a very hot night, and besides the house was full up and I could not find much of a place to retire that night.

A little before three I was startled by three sharp pistol shots right in quick succession.

After the first group there was an interval of perhaps forty seconds, and then another group of three shots. The last shot was a little muffled. Not quite so distinct as the first five. With that exception, they were all alike.

I certainly was wide awake at the time the shooting commenced. What called my attention to the pistol shots was that just after we went to Fresno we opened a school, and I was awakened by three pistol shots at about the same hour of the night, which was the signal for a fire, and found our own schoolhouse was on fire.

I could not be mistaken about the number of shots.

CROSS-EXAMINATION.

I very distinctly heard the screams of a woman afterward.

J. J. Norton, recalled, testified as follows:

I lived at the corner of M and San Joaquin streets at that time—the east corner—and was at home that night. I was awakened by the shooting. I could not say I heard more than five shots. I thought I heard five shots. After I heard the first shot—I was sleeping towards San Joaquin street, with a window up, and with a screen between us and the street—I raised up and looked out the window and I heard more shooting and screaming, and then I went out on the porch. Probably 15 minutes after the shooting finished I went up to McWhirter's house. I wore the slippers which you show me to go to McWhirter's that morning. I went in this end of the alley-way, went down to Mr.

McWhirter's house, and went in where the boards were knocked off in the back part of his yard. I think I came from the north to the south. I came right out on San Joaquin street and went right down the alley. I probably stayed at the McWhirter place probably half an hour, and I was wearing these heelless slippers all that time. After I got into the yard I examined all the bullet holes I found around there. I examined the bullet holes in the vicinity of the water-closet, and examined them all there. I examined five bullet holes.

After getting there about fifteen minutes after the shooting ceased, I went in where those boards were knocked off, right along here some place (showing). I walked all around in this part of the part of the yard where the bullets were fired. Then I walked up as far as the back part of the house, and back again. I then came back into the alley and went towards Calaveras street, and went home. I went home back the way I came—through the alley. It is north from the McWhirter house, through the alley. The streets run rather north—northeast and southwest.

Referring to the manner in which the shots came, I think I heard two, then a space, an interval, then two more, and then another interval, and then another shot. During these intervals I heard a woman scream. I heard her say something. I could not tell what it was she said. I heard her say, "O, papa, papa," like that. But I could not distinguish what the words were further than that. I could hear "O, papa." I could not understand the rest of the words—they were rather faint, and then commence and go over it again.

It sounded like some one pleading to somebody else. I could not say the exact words. I can't say that I heard any other words.

It was about fifteen minutes after the last shot was fired that I got to that alley. I went out and stood on the porch quite a little bit before I went over there.

Standing on the porch I could see the alley. It was not more than thirty seconds, I guess, from the time the last shot was fired until I got out on the porch. The night was very calm and still. I heard no other noise than the shots, and the groan, screaming, or pleading. I heard no one run up or down the alley.

After the shots, and after I got out, and after the lady had been screaming, I saw a good many people going to the McWhirter residence. I did not see any running. They were walking. I could hear their footsteps, and see them also.

CROSS-EXAMINATION.

Those slippers which I wore measured $11\frac{3}{4}$ inches in length.

When I got over to the house there were several people there, but only one that I knew. Before I got to the house I met Babcock and Charles Packard in the alley. They were looking for tracks to the north of the alley. As I was going into the alley, they were coming up the alley toward me. They said they were looking for tracks. They were not following any tracks. They turned and went back with me. I entered the yard through the hole in the fence where the boards were knocked off.

I did not go into the house. The body had been removed into the house before I got there. I walked

around to see what I could see. All the people that I saw going to the McWhirter house were going there from the north. I don't think there was any wind that night. In the alley I went south to a kind of woodshed or woodhouse just below the McWhirter place. In going home I went to the north.

RE-DIRECT EXAMINATION.

The parties looking for tracks in the alley did not find any while I was there.

Mrs. Bell Norton, a witness on behalf of the defendant, testified as follows:

I live on the corner of M and San Joaquin streets, in Fresno, and was living there at the time of Mr. McWhirter's death. I remember that morning. I was awake at the time of the shooting, and had been so for some time before the shooting. I know that because I heard the train go through. I knew the train time, and I had not been asleep since.

I am the wife of the gentleman who was just on the stand, and, as he is a railroad engineer, I know the time of the arrival and departure of the trains.

The night on which he was killed was a calm, quiet night. Prior to the shooting, or the noise of the shots, I did not hear any other noise. I did not hear any noise as if someone was pounding on a board, or anything of that kind. My window was open that night. I am not sure as to the number of shots. They came from the south. There was an interval between the shots. I heard one shot, then the two that way (clapping hands), and

then there was an interval between them. I am indefinite about the number of shots after the first three, but I know I heard the first three. After the first three shots I heard a man's voice make an exclamation of some kind. I could not tell what it was, and then a woman's voice screaming. I heard her say "O, mother," and ask some one to come to her, and she asked why this had been done in some way. I don't know whether she said why did you do it, or why it had been done. My best impression was that it was a woman's voice asking why her father had shot—why he had done this. I heard the word "Papa" used, and that is why I thought it was a woman's father that had done the shooting. During the shooting I put my elbow on the window sill. I was right in front of it, and remained in that position all of ten minutes. From where I was I could see the alley which runs back of Mr. McWhirter's house. It was light enough for me to see anyone who might have entered or come out of the alley by that way, and I did not see anyone. I did not go over to the McWhirter place. My husband did.

CROSS-EXAMINATION.

I live 375 feet from the McWhirter residence, and I never went nearer than that distance to the McWhirter place on that night. I am certain I heard the man's voice before I heard the female voice. If there was any screaming or calling out by a female voice before I heard the man's voice I did not hear it. I do not think it possible there could have been a whole series of screams before I heard any of them. I am just as certain as

anything else that I have testified to that I heard the voice of the man before I heard the female voice at all. I heard the man's voice after either the second or the third shot. They were so close together I could not tell you. I did not hear what the man said. His voice was not pitched in a loud tone. I don't think it was Tom Rhodes' voice that I heard. I thought the voice came right from where the shots did.

The train I heard before the shooting was a southbound passenger train. I don't know what time the southbound train passed through Fresno that night. I know positively I heard it go through, and had not been asleep from the time it had gone through. There was a northbound passenger train which pulled out just after the shooting, or while it was going on. My husband called my attention to it. It was after the shooting had commenced. I am certain that the 3:20 northbound train was not the first train I heard. I don't think the man said words. It was an exclamation of some kind, "O," or something of that kind. It was a sound of distress—that is, I would imagine it so. I don't think it was a groan. I heard no groans that night.

I am sure I did not hear the woman say "O, papa, why have they done this?" I am not sure as to what the language was. The reason I have an impression that she said "O, papa, why has this been done!" was because I did not know any one that lived there, and when the woman made an exclamation I said to my husband, "Get up, there is a man hurt." I said "Listen to that poor woman scream—get up and see where it is."

First he said it was some family affair, and he did not care to get mixed up in it. Then he said, "I think some fellow has staid too late and the father is after him with a shotgun." I thought it was some woman pleading with her papa, and asking him why he had done this. That is why it impressed it on my mind so.

I did not testify before the coroner's jury or in the trial of R. S. Heath at Fresno.

Mr. McFarland is the first person I communicated my knowledge on this subject to. I have talked it over with a great many people. I suppose myself and husband have talked it over to the neighbors. I did not tell Mr. Bury what I knew or what I thought. Bury came to me and asked me regarding the slippers that my husband wore. I don't think I ever said anything about what I knew to any one on the side of the defense. I did not expect to be brought in at all. Mr. McFarland was the detective employed by Mrs. McWhirter. Mr. Phil Scott came and asked me about it after the coroner's jury, and before the trial of Richard S. Heath. I was never subpoenaed to tell what I knew about it.

Crittenden Thornton, a witness sworn on behalf of the defendant, testified as follows:

That is the bullet that was picked out of the small board in the corner of the chicken house (showing.) This one (showing) was one of two or three bullets which was cut or sawed out of the skirting board either in the passageway between the chicken coop and the shed or at the west of the chicken coop. In the base board. The flat and battered bullet is the one

that was taken out of the corner. And the other one, which is somewhat battered, is one of two or three that were taken out of the base board north of those others. The board in which this flat bullet was found was a pine board of from $7\frac{1}{2}$ to 8 inches in width, about one inch in thickness, and from $2\frac{1}{2}$ to 3 feet in length. It was not a part of any other board, it was an individual board, but there were other boards there which formed the continuation of that board, put upon the fence for the same purpose. I do not think it was a piece of a box.

The hole upon the south side of the sack, that is upon that portion of the sack which was nearest the middle fence, was between the size of a silver five-cent piece and a ten-cent piece. The other hole was of irregular size and shape. It was not round. I do not pretend to say that it was as small as a five-cent piece or that it was not as large as a ten-cent piece.

W. P. Thompson, a witness sworn on behalf of the defendant, testified as follows:

I resided in the house of McWhirter some time after his death. The board in which this battered bullet was found was a pine board. I don't think it was part of a box—it may possibly have been, though. My recollection is that it was a board placed there to cover a hole in the base-board. It was nailed on.

CROSS-EXAMINATION.

As to that board of which I speak being a base-board, I do not make any assertion either way. I only give my recollection. My recollection is that that board was put there to cover the hole, and that there were some other boards that joined along under

that stringer. My recollection is that there was another board put behind it, and that is what makes me think it was put there to cover a hole, because there was a hole there, as I recollect.

RE-DIRECT EXAMINATION.

The hole was large enough for a chicken to go through. That board was taken into the house, and taken away before the coroner's jury was brought there, and then was brought back. When you (Mr. Budd), Mr. Thornton and I were there, it was placed there for the coroner's jury to view, with the bullet in it. The bullet was discovered on Wednesday, or Thursday, the 8th of September, at 10:40 o'clock in the forenoon.

RE-CROSS EXAMINATION.

The board was simply removed into the house to preserve it. Nothing was changed except the position of the board, and then it was taken back again and placed in the position in which it was originally found.

Mrs. W. N. Rorer, a witness called on behalf of the defendant, testified as follows:

I have lived in Fresno for the past six years, and at the time Mr. McWhirter died we were living on the corner of L and Calaveras street, and slept on the side next to Mr. McWhirter's house, with the windows open. I was awake at the time of the shooting. I had been up with my children and had just gone to bed, but did not sleep. That night I heard the shots—I could not tell how many—and heard Mrs. Mc-

Whirter scream. That is all I heard. When I heard the shots I did not hear any other noise in Mr. McWhirter's back yard, and I did not hear any other noise afterwards in Mr. McWhirter's back yard or in the alley. I cannot tell you just what I did when I heard those shots. I was very much excited. I ran to the back door and then to the front door, but did not go outside. The inside door was open. They had screens on them. I think I was awake about an hour before the shooting occurred. During that entire night before the shooting I did not hear any noise in the back portion of my house or Mr. McWhirter's yard, or the back portion of my yard. I did not hear any knocking off of boards. It was a quiet night, as I remember, and I don't think I remember of hearing anything. I did not hear any person running away from there after the shooting. Back of my house there is a barn and woodshed, and the house between my house and the McWhirter residence was vacant, and the barn and shed unoccupied. Two or three nights before I heard a noise in the back of my house, which sounded to me like a horse kicking. We went out. I heard a noise as though it might be the horse kicking, or making some disturbance, and we went out to see about it.

That was two or three nights before the killing of Mr. McWhirter, between ten and eleven o'clock. It sounded like a horse kicking against the barn.

I know Mrs. McWhirter. I saw her on last Saturday evening. I don't remember what she said. I don't think she said anything about my not testifying. I don't think she said anything to the effect to say nothing against her in this case.

CROSS-EXAMINATION.

I testified at the coroner's inquest that I heard the horse neighing, and a sound like the back gate shutting, and a noise like someone walking around. I suppose my recollection of these sounds was better at the time of the coroner's inquest than it is now. I supposed the noise was in our back yard. I testified at the coroner's inquest, "I think I heard seven or eight shots." As near as I can remember at first I thought it was more than six, but I did not count them. I said I heard three in the first place, and after that I did not count them.

I don't remember hearing any train going by on the railroad that night.

RE-DIRECT EXAMINATION.

I testified at the coroner's inquest: "I could not tell how many shots had been fired before I heard that (sound from Mr. McWhirter). I was so excited."

I recollect now hearing "O" in Mr. McWhirter's voice after the interval, as near as I can remember.

WILLIAM DAVIDSON. AT INQUEST.

The testimony of William Davidson, given at the coroner's inquest, was then read in evidence by the defendant, as follows:

My house is right opposite where McWhirter lived. That morning I heard the shot, and immediately after the shot I heard a noise as if a man was in distress—something like that "O," or some such noise as that, and right after the first shot, probably a second or two, I heard three more shots in quick succession, and then I heard a woman scream, and two more shots

after that, and just about a second after that I heard a woman, "O, Mr. Davidson, Mr. Davidson," and my wife said that is Mrs. McWhirter's voice, so I jumped up and put on my pants and coat and a pair of slippers, and rushed over there and saw Mr. McWhirter lying on the ground and Mrs. McWhirter bending over him, so I went to Dr. Pedlar's, and found he had gone, and right there were Officer Babcock and some other officer, and we went back together.

I don't think I was awake before hearing those shots, and I did not hear any other noises of any kind or character before I heard those shots. I heard the first shot and immediately after the first shot I heard somebody as though he was in distress—"O, O," as if a man was in pain. And then I heard three other shots. I heard six shots distinctly and counted them as I heard them.

Wm. N. Rorer, a witness sworn on behalf of the defendant, testified as follows:

I have resided in Fresno for the past six years, and am the husband of the last witness on the stand. At the time of McWhirter's death I lived at the corner of Calaveras and L streets. Some three or four nights before Mr. McWhirter's death my attention was drawn by my wife to some noise in the back portion of the premises, and I went out to find out what the noise or disturbance was, and I found nothing, everything was quiet, and I saw no one going away.

On the night of McWhirter's death I was sleeping on the north side of my house with the windows all open. Was awakened during the night by a shot, and more shooting and loud screams, and general noise

and confusion. Before the shooting was entirely over, I began to dress to go out. I started to count the shots but lost them before it was all over. I could not tell how many shots there were, accurately. There was one shot, a small pause, then two more, a longer interval, then three or four more—I could not tell how many there were. The woman was screaming during the last shooting.

I did not hear any noise that evening in the back portion of McWhirter's premises or of my own, nor any knocking of boards off, or talking, or anything of that kind—nothing at all. I went out the front way to McWhirter's.

CROSS-EXAMINATION.

I lost the number of shots before the shooting was over. I was asleep when it began. I first heard the screams during the interval. I was not awake prior to the commencement of the shooting, but I don't think I had been sleeping very soundly. I think I heard the first shot distinctly—at least I thought I did.

John S. Eastwood, a witness sworn on behalf of the defendant, testified as follows:

On the night of McWhirter's death I was residing at the home of A. M. Clark, and went over to McWhirter's some minutes after the killing. Got there before Officers Babcock and Welch. In going over there I went through the gate south of the windmill. Mr. Rorer and Dr. Cooper at that time came in at the south gate of the Clark residence and passed out of the rear gate by the windmill, went right up the alley

and I behind them. We could not get in the gate, and they went through the opening in the fence, and I opened the gate, reached over the latch.

CROSS EXAMINATION.

I was asleep when the shooting began. The sound of shooting and the sound of screams came in close together.

There were no other people in the alley at the time we went through there, but a short time after there were quite a number going up and down the alley.

Thomas Bury, a witness sworn on behalf of the defendant, testified as follows:

I have been a detective for the past seven years. I was in Fresno on the night of McWhirter's death, having got in on the night train. A few days after I was employed by the county and worked under the instructions of Deputy District-Attorney Welch for 12 or 14 days in Fresno. There was 25,000 dollars reward offered for the detection of anybody who killed McWhirter. I was employed by the county and the citizens.

I went to the McWhirter residence on the 29th of August, and made a slight survey of the premises, and then went away. I think it was on September 1st I went down there again, when I made an investigation as regards the location of the shots, and went into the house and had an interview with Mrs. McWhirter, Mr. Hensley and Mr. Welch being present. We found five bullet holes. A man could stand in the front of the water closet and have fired the shot into

the rear of the water closet, up in the eaves, and the one down below in the fence. The one in the fence near the water closet was powder marked. There were two more bullet holes north of the water closet, in the fence. They went outward through the fence. We found one hole in Clark's fence on the other side of the alley.

After examining the premises on the outside, we went in and had an interview with Mrs. McWhirter and the hired girl, and then made an investigation of the chicken yard, and in here, in what is marked hen's nest on the map, we found a carpenter's saw similar to the one you show me. There were fibers of yellow sawdust on it. Mr. Welch handed it to the sheriff, and the next time I saw it was in the district attorney's office, and it had those fibers still on it. A carpenter was called in and the saw passed over to him, and he picked off the larger pieces of the fiber with a penknife, and took a brush and brushed the balance of them off, and they were put in a vial. There was some sawdust found in the hen's nest at another time by the city marshal and myself. The sawdust found on the teeth of the saw was yellow dust. I went to the McWhirter premises altogether two or three times. When I was there with the marshal we noticed a little sawdust on the edge of the hen's nest, and some that had dropped on the floor and also in the nest; also marks of a saw there. We gathered that up and took it to the district attorney's office, and sealed up in a vial. There were some feathers in it. The sawdust in one vial was the sawdust taken from the teeth, and the other from the hen's nest.

(Vials offered and admitted in evidence).

In endeavoring to find a place from which those clubs had been cut, I found that there had been some osage orange trees lying in a lot north of Mrs. Southwood's house. Mr. Ward was with me. It was in the middle of the afternoon. I raised the piece up that had been lying there for a while and commenced to saw a piece out of it, when a cow came up and bothered me by rubbing her nose against me, so I dragged the piece probably 10 or 15 feet, I think, clear to the fence and sawed the piece off. That piece which you show me, marked Bx looks very much like the piece I sawed off. I took the piece to the jail and kept it in a room there. I did not draw the limb from which I sawed the piece off back to the place in which I originally found it. On the last day of the inquest I went to the lot next to Mr. Southwood's with the coroner's jury, and found that the tree had been taken from the place where I left it to the place where it was originally located. I do not know who did this.

When I was at the McWhirter premises, when Mr. Thompson, you and others were there, I took a steel tape-line down there. There was considerable comment about a sack that was tacked up against the middle fence, and we measured through that hole to get the angles.

The board in the chicken yard had been taken off when I got there. There was a bullet imbedded in the board. It was not a very large bullet. It seemed to be flattened some. It was very black, and an old shot.

We searched along the base of the north fence of the chicken yard and found quite a number of bullets there—I do not now recollect how many—some of which were cut out at that time.

The small hole was about as large as the end of a pencil or something of that kind. I did not pay particular attention to that hole. There was a large hole on the other side. We did not do anything particular to enlarge that hole. We ran a tape-line through it, and possibly that might have enlarged it somewhat. I did not do anything intentionally to enlarge it. Mr. Thompson or Mr. Thornton made no objection to putting that tape-line through the hole at the time. I do not know what became of that board and sack. A line between that hole in the sack and that bullet in the fence would come into this chicken-coop here. The line struck the corner of this movable coop. Several members of the coroner's jury and myself ran this line. If the bullet had gone through there straight it would have struck the corner of this coop at point 4 (showing). I don't think the hole in the sack was over 18 inches.

CROSS-EXAMINATION.

My first definite engagement was in the afternoon or about noon of the 29th of August. The county of Fresno paid me for my services in this matter. I definitely embraced the theory of suicide on the last day of the inquest. I think my employment by the county ceased about ten days after the inquest. About the middle of April I was employed by the defense in the Heath case, somewhere along there, and I remained in Fresno until the evidence in that case was all in.

Q. You were in constant consultation with the attorneys for the defendant (in the Heath case during the trial?)

Mr. Campbell—We object as immaterial, incompetent and irrelevant.

Objection overruled and exception.

A. Yes, sir.

I was present at the coroner's inquest a part of the time.

On that saw marked H. H. W. there is a tooth that has been flattened somewhere. Here is the tooth, $7\frac{1}{8}$ inches from the end on the right hand side of the saw.

I cannot observe any tracing of repairing or setting or refiling that saw since I first saw it. I think that is the same saw.

(Admitted by the plaintiff that L. B. McWhirter arrived at the Palace Hotel, in the city of San Francisco, on the forenoon of Sunday, June 5th, 1892, and that he left the Palace Hotel on the afternoon or evening of Wednesday, the 8th day of June, 1892.)

Mr. Bury—At the time I went to the McWhirter premises with Mr. Welch and Mr. Hensley, there was a piece of rope hanging to that post.

I did not make any examination of the middle fence for bullet holes. I would not swear that the holes in the gunnysack were bullet holes. The board in which the bullet was imbedded is a pine board about a foot wide or a little more. The bullet was a very black bullet—a very old shot. There was a rip or scar made by the bullet. The bullet was not far from the center of the board according to my recollection, and was flattened somewhat. The bullet was smaller than a 41 and declared to be a 32. I don't remember how high the stringer was above the ground.

I sawed that bough or branch of osage orange two or three hours before sundown. I don't think any member of the coroner's jury or any one else asked me to point out the place where I had sawed that branch or bow of osage orange.

My impression is that I placed a handkerchief or a piece of paper under the bow of osage orange that I was sawing, in the first place, but I did not catch any of the sawdust owing to the friendly cow that was in the way.

Mr. Welch took the saw off of a nail in the chicken-house. This was before I sawed the branch of osage orange in the lot next to Mrs. Southard's.

RE-DIRECT EXAMINATION.

There were several other branches of osage orange scattered around in that lot.

Henry Steel, a witness sworn on behalf of the defendant, testified as follows:

I am a merchant tailor. I knew Mr. McWhirter, and he dealt with me in the year 1889. He was in debt in February, March, April, May, June and July of 1889 to the amount of about \$200, which was paid in 1891 as follows: June 9, \$25.00; February 17th, \$125.00; June 20th, \$10.00; November 6, \$140.00. It was overdue, and this includes interest. This was paid through my attorneys in Fresno, Tupper & Tupper.

G. H. Bernard, a witness sworn on behalf of the defendant, testified as follows:

I have lived in Fresno for the past twenty years, and was a member of the coroner's jury that inquired

into McWhirter's death, and went to the place with the rest of the jury. We found a sack on the fence, about 10 or 15 feet from the back gate. There was one large hole in the sack about the size of a 20-cent piece or a two-bit piece, and there was one or two small holes down near the bottom of the sack to the left. There was also a bullet shown in the fence in the chicken yard. It was in a board, I should judge, about from 3 feet to $3\frac{1}{2}$ feet long. It was a small bullet, and near the baseboard of that west fence, underneath the stringer. The bullet was an old bullet, with two or three little scratches on it as though marked with a pin or a penknife, and a little flattened on one side. It was an old hole and an old bullet. We found four or five bullet holes in the fence, and I think that you, yourself, picked out one or two bullets out of the fence. Mr. Bury had one of those tape lines, and he and I and Mr. Fuller, the foreman of the grand jury, drew a tape line from this hole in a direct line, and we could not hit that bullet, because it would have gone into this coop, or pig pen, or obstruction there of some kind. The obstruction was there when I got there.

The hole in the sack was a pretty good-sized hole, and my idea at the time was that chickens had picked holes in the sack. We also examined the holes in the closet and in the fence there. I also went into the vacant lot with Mr. Bury to inspect a tree that was there, out of which Mr. Bury explained he had cut a piece. We did not find any sawdust there.

There was no attempt made to enlarge that hole in the sack with the tape line while I was there. I think

Mr. Thornton made some objection to the sack being taken off the fence. I don't remember anything being said about the board. The coroner took the bullet out of the board.

CROSS-EXAMINATION.

Q. Did you hear Mr. Phillip Scott, a member of that coroner's jury, at that time and place, ask any person to point out where the sawdust was, which was made in the sawing of these limbs?

A. I don't know. I don't remember it. There was something said about sawdust, because you were there at the time.

Q. Was something said about sawdust?

A. Yes, sir.

Q. What was said—by whom and to whom?

Mr. Campbell—I object to the question as not cross-examination.

The Court—He testified there was no sawdust there in his direct.

Mr. Campbell—But what Mr. Phillip Scott said is not cross-examination.

The Court—I think perhaps his attention may be called to what was said about sawdust in connection with whether or not there was any. I think the question is proper.

Mr. Campbell—Exception.

A. Some one said where is the sawdust; I think that you said where is the sawdust.

Q. What, if anything, did Phillip Scott at that time and place say about sawdust?

Mr. Campbell—Subject to our objection and exception.

A. I don't remember whether Scott said this or no. I do not deny that Scott said so. I have an idea you inquired where is the sawdust. I don't think Mr. Bury found any sawdust where the limb was sawed. He told us at the time that there was a cow that interfered with him, and he went over to the fence and sawed the piece out, and left the limb there.

The large and small holes in the sack were from 15 to 20 inches or two feet above the ground—something like that. I think we had to stoop down to see the bullet in the board. The rip or scar outside of the bullet I should think was $\frac{3}{4}$ of an inch or something of that kind. Maybe an inch and a half. I think the scar was old. The bullet was a small bullet stuck on that board. It looked like a piece of gum to me as it was in the board. It was just in a very little distance.

RE-DIRECT EXAMINATION.

When the coroner's jury got to the vacant lot the tree was in the old rut, which was about 30 or 40 feet from the fence, as a guess. Some one made a remark that there was no sawdust. Mr. Bury told us that on account of a gentle cow interfering with him, he went over to the fence. I don't remember that Mr. Bury was asked by any of the coroner's jury to show the place where he had sawed the branch or bough of osage orange.

T. L. Reel, a witness sworn on behalf of the defendant, testified as follows:

On the night of the death of Mr. McWhirter I was stopping at the Pleasanton Hotel. I was awake when

the shooting commenced, and had been so for some little while. I heard three shots, and then a little pause, and then three more. In all I heard only six shots.

I am satisfied that the bullet in the board had been there for several months. I examined it very carefully. There were some fly specks there, and the appearance of the wood was dry. The sack was a very old sack, and rotten, apparently. I could not tell whether it was a bullet hole or not.

When we were in the lot north of Southworth's with the coroner's jury some one made a remark that they could not find the sawdust there, and the detective said I did not see it there. A cow bothered me or hooked me or something of that sort, and I took it over to the fence.

CROSS-EXAMINATION.

I think the plank in which I saw the bullet was six inches in width and about three feet long. The scar in the board was about an inch in length and about a quarter of an inch wide. My eyesight is not very good. I cannot read without glasses. We looked at that scar for several minutes.

The hole in the sack that I supposed to be a bullet hole was, I think, about an inch large. There were to my recollection several holes in the sack, I don't know how many, three or four. I could not see any difference in the holes. Both holes in the sack, the one on the inside and the one on the outside, were the same size.

RE-DIRECT EXAMINATION.

I heard a man's voice just about the time the shooting ceased, and just before a woman's voice. The coop

that I say would have been hit by the shot from the sack to the board was about three or four feet square, probably a little longer than it was wide.

W. L. Seaver, a witness sworn on behalf of the defendant, testified as follows:

Since 1887 I have been the representative of the Colt's Arm Co. and the Union Metallic Cartridge Company in San Francisco. The pistol, Exhibit No. 5, which you show me, No. 88,031, is a double-action 41 revolver, 4½-inch barrel, blued. I have a telegram to the company and also their reply in regard to this pistol. I will read the telegram I sent to them on September 1st. This is my copy of it.

Mr. Thornton—We object to that as purely hearsay, and not the proper way—an inquiry made of a third person, his reply is not the proper method of proving a fact.

Objection sustained and exception.

The following are the documents excluded by the court:

San Francisco, September 1st, 1892.

Colt's Patent Firearms Company, Hartford, Conn.

When and to whom did you invoice 41 double-action revolver No. 88,031? Answer by telegram immediately.

Colt's Patent Firearms Company.

Hartford, Conn.

To Colt's Arms Co., San Francisco, California.

88,031 sent you May 5th, 1892.

Colt's Arms Co.

Q. Can you state to this jury whether or not, in the month of May at any time, you received an

invoice of pistols similar in kind and character to that which you now hold in your hand, and if so, how many?

Mr. Thornton—We object on the ground that it is too remote.

Objection sustained and defendant excepts.

Mr. Campbell—I will ask you whether or not you delivered to the firm of Clabrough, Golcher & Co. on the 7th of June, 1892, any pistols of the kind and character which you hold in your hand, the exhibit of which I have asked you?

Mr. Thornton—The same objection.

Mr. Campbell—Q. That is a 41-caliber, 4½-inch blue, double-acting Colt's pistol, with side ejector?

A. Yes, sir.

Q. Now then, I will ask you whether or not, on the 7th day of June, if you can tell, you sold and delivered a pistol, exactly similar in kind and character, to the firm of Clabrough, Golcher & Co., in the city of San Francisco, who have their present business in the Grand Hotel Building, between New Montgomery and Second streets—that is within 500 feet of the Palace Hotel.

Mr. Thornton—We object to the question upon the ground that it comes within the former ruling of the Court.

Objection sustained and defendant excepts.

Mr. Budd—We offer in evidence the testimony of Mrs. McWhirter. It is admitted that the Convention was held in June—June 17th, 1892—that is, the State Democratic Convention.

Mr. Thornton—We object upon the ground that the evidence does not refer to the subject which you indicate.

Ruling reserved by the Court.

E. F. Bernhard, a witness sworn on behalf of the defendant, testified as follows:

I am an attorney-at-law and treasurer of the Fresno Loan and Savings Bank, and have resided in Fresno for about twenty years. Knew Louis B. McWhirter from the time he came to Fresno, and met him in a business or political way almost every day. I was friendly, but so far as social relations went we were not intimate. I attended a banquet with him about four years ago, or perhaps the campaign preceding that. It was held at Mr. Grady's house. I returned from that banquet with Mr. McWhirter.

Mr. Campbell—Q. Did you have any conversation with Mr. McWhirter in returning from that banquet in relation to suicide, or anything of that kind?

Mr. Thornton—We object to that, if your Honor please, as too remote. If it was not the campaign of 1890, it was at least 20 months before the death of Mr. McWhirter. And if it was not the preceding gubernatorial election, it was at least six years before the death of Mr. McWhirter.

The Court—This is an important question. You may take a little time to investigate. You may withdraw this witness, and go on with the case. (Witness temporarily withdrawn.)

D. L. Davis, a witness sworn on behalf of the defendant, testified as follows:

At the time of McWhirter's death, I was superintendent of construction of the Courthouse at Fresno. About that time I saw in the District Attorney's office a certain saw that had apparently been run against a nail, and had jagged the teeth on one side of it. That is the same saw (showing). At that time I made an experiment with the saw in fitting the teeth in two pieces of osage orange wood. Those two pieces marked "Ex. No. 7 and 8 Heath," seem to be the pieces to which I fitted the teeth of the saw.

Mr. Budd—Q. I will ask you whether or not in that saw at that time there was a tooth that fitted into the cuts or curves of this osage orange?

The Court—That is a matter which the jury can determine. Is the saw in the same condition—can you determine whether the saw is in the same condition now as it was then?

It looks to be nearly the same. Yes, sir. I don't see any material change in the saw.

The Court—What is your question, Mr. Budd?

Mr. Budd—Whether or not, at the time when he was called in by the district attorney of the county, he made an examination of the saw and fitted the teeth into these cuts or curves in this osage orange, where it had been sawed?

(Saw examined by the Court.)

The Court—I think the jury can view that as well as any expert. This is out of the range of expert testimony. (The saw and the clubs were then handed to and inspected by the jury, and they were allowed

to make their own comparison of the teeth of the saw and the edges of the club.)

Mr. Budd—We except to the ruling of the Court.

Mr. Campbell—Does your Honor rule that this witness could not take them and show how he fitted them in at that time—that this witness is an expert, and that he cannot testify what he then saw, and show to the jury now how he did it?

The Court—I think the jury can do so as well as he can. Any man can fit them as well as a carpenter can.

Mr. Budd—We offer to prove by this witness the manner in which he fitted it, and the result.

Same ruling and exception.

When the District Attorney showed me that saw there was some sawdust in the teeth. I cannot tell you positively what kind of sawdust it was. It was of a reddish color, or perhaps of a yellowish nature. It was not compared with any other sawdust at that time to my knowledge. The sawdust was put into some vials, I think. The color was nearly that same color, as I remember it. A portion of it was a color of the heart, and a portion the color of the white wood.

I think Exhibit No. 8 is the same club.

CROSS-EXAMINATION.

I don't think I could tell the weight of the sawdust. It was a very small particle, I know, perhaps four or five grains, something like that. I examined the saw some days before the coroner's inquest. It would be very hard for anyone to say it was possible or positive to identify the sawdust produced from wood by the

quantity which was found upon the teeth of that saw. I used a microscope or lens for my examination—about an inch and a half. It is the medium size, I think. I am familiar with the grain and color of dry peach, dry mulberry, dry sugar pine, dry white pine, and dry yellow pine. I could not say that the sawdust which I found on the teeth of that saw did not belong to white pine, or sugar pine. I don't think it was mulberry.

James A. Ward, a witness sworn on behalf of the defendant, testified as follows:

At the time of McWhirter's death, and the inquest on his body, I was Deputy Constable in Fresno. I think I heard about his death at about 7 o'clock on Monday morning. I dressed myself as soon as possible, and went to the house and in the yard, and examined the outhouse and fence. I stayed there probably about half an hour, and then went to the Sheriff's office. I saw five bullet holes—three in the fence and two in the closet. There was one shot about two feet above the seat of the closet, and one outside the closet in the eaves, and one in the fence. There were two boards knocked off about here, and there was one bullet hole just this side of that hole, and that was powder-marked. Then over I should judge about 15 feet from the closet there were two holes in the fence. They were the only bullet marks that I saw. I examined the back of the house and the back of the fence, but did not find any there. I found a hammer in the cellar, and a hammer in the woodshed. In the chicken house or in the cellar way at this time—I

don't remember which place, there was a little box with a lot of shingle, sixpenny, and all kind of nails. They were nails that had been used for something, and then pulled out and put in this box to save them. Then I found some more nails in the office in the yard, that had been dropped by the carpenters, I suppose, in building the house. The nails which you show me, I believe, are part of the nails that I picked up to bring down to the courthouse. Exhibit 21—I compared those nails with the nail in the club, and it was the same kind as some of the nails in the club, and they were all rusty. I went into the chicken coop or chicken house and saw some marks on the nests put there for the chickens, and across the front and side of one of them there were the marks of a saw. I saw no sawdust there, and I think this was after the sawdust had been removed. The saw marks were on the second nest from the corner, and were not over an eighth of an inch deep, just as though you would catch a block and the tail of the saw would catch sometimes. Mr. Winchell and I also found some clothes line hanging on this clothes post in the yard, and we took what there was hanging on the post. It was a white cotton line. The outside of the rope was weather-beaten, the ends being pretty clean, as if a piece had been cut off. It looked like the piece which you show me. We compared this rope and the rope found on the club, and from the comparison I believe they were the same rope. I did not see the board with the seventh bullet in it.

There were about thirty hammer marks on the boards, and were close to the bottom, where the board

had been nailed on to the stringer, and above the top stringer.

In the yard next to Mrs. Southwood's Mr. Bury and myself found some osage orange, and got a saw from the soda works, and cut a piece out of this piece that laid in the yard. This was about three o'clock in the afternoon, and I know it was not later than four. At the time we were cutting that Mrs. Southwood and another young lady were present—I don't know whether it was her daughter or not. Bury started to cut it, and a cow interfered with him, and I told him to pull it over to the fence, which he did, and cut it there. I know that he did not take up any sawdust at that time. We took the pieces to the sheriff's office.

I was working for the county at the time and wanted to get the \$35,000 reward. I was pretty diligent.

CROSS-EXAMINATION.

I was a constant attendant and a witness at the coroner's inquest in this case. I believe the hammer which you show me is the one I found in the cellar and took to the sheriff's office. I compared the hammer with the marks on the board at the sheriff's office.

Some of the marks on the board were made by a round-headed hammer, and some by an octagonal-headed hammer, and on the other board marked No. 10, Heath, they are made by a round-headed hammer. I worked at carpentering for some time.

I did not see Bury take a piece of paper or handkerchief out of his pocket for the purpose of catching the sawdust.

Mr. Campbell—In order to save time, we will offer to prove by Mr. Golcher of the firm of Clabrough, Golcher & Co.—something similar was asked of the witness Seaver this morning, that the pistol was received by them on the 7th of June, from the agent of the Colt's factory, and sold on that day.

Mr. Thornton—Objected to on the same ground—on the ground of indefiniteness and remoteness.

Objection sustained and exception.

Mr. Ward—I don't know that I can come forward and pick out the rope found on the McWhirter place, but I believe that is the piece—the longest piece. It was taken from the post right at the lattice work. I know of but one piece being taken away from the premises, and Mr. Winchell took that, I believe. I compared this rope with a piece that John White brought there. That is the only comparison that I know of.

I could not tell whether the hatchet had six or eight sides.

Mrs. J. S. Eastwood, a witness sworn on behalf of the defendant, testified as follows:

I have lived in Fresno for the past eighteen years, and am acquainted with Mrs. McWhirter, but was not acquainted with her husband. I knew him by sight for a short time before his death. I was not intimate with her.

In the month of August, 1892, I lived at A. M. Clark's house, just back of the alley. I was there on the morning of McWhirter's death, and was awakened by the shooting. I don't know how many shots

were fired. About nine o'clock that morning I went to the McWhirter residence, where I found Mrs. McWhirter and quite a number of other ladies. I remember Mrs. McWhirter spoke of the very happy time she had had with her husband that summer in the mountains and all the pleasure he seemed to take with his little boy and wife during that summer. I also remember that she stated that he seemed unusually affectionate to the boy that Sunday evening before his death. She said in the morning it seemed to her that he must have had a presentiment, he seemed so affectionate with the child, although he always was affectionate, but unusually so that evening. There was other conversation, but I don't recollect it.

The Court—I have considered the question that was submitted yesterday on the introduction of evidence which proposes to show by the witness Bernhard that he had a conversation with the deceased at one time in which reference was made to another person whose word and reputation were in a very bad condition, and it is attempted to be shown by the witness that the deceased remarked concerning that other person, that if he were reduced to such a condition, or were in such condition, he would take certain action and do such and such things. The objection to that testimony is sustained.

Mr. Campbell—I think I can fix the time. Please call Mr. Bernhard.

The Court—It is fair to counsel to have the record show at what time it was.

E. F. Bernhard—Re-called for defendant. To the best of my knowledge and belief I had the conversation with Mr. McWhirter, of which I spoke yesterday, in the spring of 1889.

Mr. Campbell—Q. I will ask you whether or not in the spring of 1889 you had a conversation with the deceased, L. B. McWhirter, in relation to suicide, and if so, what that conversation was.

Mr. Thornton—Same objection, upon the ground of remoteness, immateriality, that it opens up collateral issues, a comparison of the merits or demerits of a third person, and four years before the contract was made—three years, rather.

Objection overruled and exception.

CROSS-EXAMINATION OF MRS. N. S. McWHIRTER

At the trial of Richard S. Heath, was then read in evidence as follows:

You cannot ring the bell from the inside. The sound came from ringing the bell on the outside. It is about three feet from the floor.

I said I thought that the pistol my husband took from under the bed that morning he had since May or June. The first time I became familiar with the pistol was in the mountains.

Before we went to the mountains I remember noticing the pistol lying on the stand, and once I took it out from under the bed, and laid it up, sometime during that time. I just laid it on the stand in the closet.

My husband had a pistol all the time, but the first time I ever saw that pistol was in May or June.

I do not know where my husband got that pistol. I think that he bought it from Mr. Warnekros, as he usually dealt there, but I am not sure about it. My husband was in San Francisco in June, for some days. I am positive that he did not buy that pistol there at that time, because he had a pistol in his office during the convention. He had a black pistol. I presume that is the same one. He had two pistols, one of which he gave to my brother after he got into the mountains.

W. R. Lambert, a witness sworn on behalf of the defendant, testified as follows:

I am clerk of the Oakland Police Court. The papers marked 4225 of the Police Court, in and for the City of Oakland, are a part of the record of my office, as well as the City Criminal Docket No. 2, Police Court, City of Oakland, particularly 566 and 567.

Mr. Campbell—I now offer in evidence a complaint against the deceased, Louis B. McWhirter, sworn to on the 15th of March, 1892, charging him with a crime—I offer in evidence the warrant with the return on it, showing that on the 28th of March, 1892, he was arrested on that charge, and in addition to that a bail-bond and the record in the case, showing that at the time of the death of the deceased it was pending. That the case was set for May 16th, 1892, and that it was continued until the 16th day of May, 1892, and continued to May 23d to be set; that on the 23d of May the case was continued to May, 31st, 1892; that on the 31st day of May, 1892, it was continued to June 6th, 1892, for arraignment; that on the 6th day

of June, 1892, it was called, and a plea of not guilty was entered and a trial by jury demanded; that on the 26th day of July, the cause coming on regularly for trial, it was continued to September 22d, 1892; that on the 22d day of September the case was called and dismissed on account of the death of the defendant. It is offered for the purpose of showing that at the time of the death of the defendant that he was under arrest upon a criminal charge—that of extorting by means of threats—attempting to extort money, to-wit: the sum of three hundred dollars of lawful money of the United States from said A. Marks by means of a verbal threat then and there made by said Louis B. McWhirter to accuse said A. Marks of a crime. I offer that upon two phases of the case, if your Honor please, on the same proposition which your Honor admitted the testimony of the financial stress, and I also offer it in connection with the testimony of the witness Bernhard. I propose to show this is one of the things which occurred, that he stated if he got into disgrace or anything of that kind that he would commit suicide. I offer it to show, in connection with the other facts, that at the time of his death there was a criminal charge pending against him, and secondly, to show, in connection with that testimony, that he had been charged with crime, and had been arrested in his home and had been compelled to give bail.

Admitted in evidence.

Mr. Campbell—I will make a statement of the substance of it. State of California. In the Police Court. People of the State of California vs. Louis B. McWhirter. A. Marks, being duly sworn, deposes and says that

Louis B. McWhirter did, in the City of Oakland, County of Alameda, State of California, on or about the 4th day of January, 1892, did unlawfully, wilfully and unsuccessfully attempt to extort money, to-wit, the sum of \$300, from said A. Marks, by means of a verbal threat then and there made by said Louis McWhirter to accuse said A. Marks of crime. And all of the acts of said Louis B. McWhirter in the premises were and are contrary to the statute in such cases made and provided, and against the peace and dignity of the People of the State of California. He therefore prays that a warrant issue and that said Louis McWhirter be dealt with according to law.

A. MARKS.

Subscribed to before me this 11th day of March, 1892.

W. S. BROWN,
Clerk of the Police Court of the City of
Oakland.

[Endorsed:] 4225. Police Court in and for the City of Oakland. People of the State of California vs. Louis McWhirter. Filed this 15th day of March, 1892. W. S. O'Brien, Clerk of the Police Court of the City of Oakland.

Upon that we offer now in evidence the warrant issues upon that complaint on the 15th day of March, 1892, in addition to that the order, the return on the warrant. There is an order authorizing it to be served out of the County of Alameda, dated the 28th day of March, 1892. The return on the warrant is: "I hereby certify that I received the within war-

rant on the 28th day of March, 1892, and served said warrant by arresting the within-named defendant, at Fresno, California, who gave a bond in the sum of \$200, before D. K. Prince, Justice of the Peace of said Fresno County, for his appearance as required by law, which said bond I have brought into court this 30th day of March, 1892. William ——, Sheriff, by W. W. Morrison, Deputy.

That the bail bond was given for the sum of \$200, signed by sureties on the 29th day of March, 1892, J. P. Meux and F. F. Letcher.

The record is as follows: City of Oakland, County of Alameda, State of California. Honorable B. F. Ogden, presiding. People vs. Louis McWhirter. Charge, misdemeanor. The following proceedings were had. Complaint and affidavit of A. Marks filed, alleging that one Louis B. McWhirter did in the City and County of Oakland, County of Alameda, and State of California, on or about the 4th day of January, 1892, commit the crime of misdemeanor, to wit: Attempting unlawfully and wilfully extort money from the complainant. Defendant arrested by Sheriff Morrison, and brought into Fresno County, California, and by virtue of defendant filing a good and sufficient bond, was released from custody, and the cause was set for May 16th, 1892. On the 16th day of May, 1892, the cause is called and is on motion continued to May 23d, to be set. On this 23d day of May, 1892, the cause coming on regularly, is by consent continued to May 31, 1892. On the 31st day of May the cause is regularly continued to June 6, 1892, for arraignment. On this 6th day of June, 1892, the cause is regularly

called, and defendant, by his attorney, enters a plea of not guilty and demands a trial by jury, and the cause is set for July 26, 1892. On this 26th day of July, 1892, the cause coming on regularly for trial, on motion is continued to September 22d, 1892. On this 22d day of September, 1892, the cause is regularly called, and on account of the death of defendant, the cause is struck from the calendar.

Melvin C. Chapman, a witness sworn on behalf of the defendant, testifies as follows:

I am an attorney-at-law in the city of Oakland, and have been mayor of that city. I knew Louis B. McWhirter, and became acquainted with him in the month of January or February, 1892, at Fresno. I heard the record which you just read. I was asked by Mr. Marks to assist in the prosecution of the case. I was not regularly retained in the case. Some time in the month of June, 1892, McWhirter came to my office at the City Hall, and said that the charge was still pending in the Police Court, and asked me if I would see Marks and have it dismissed. He told me that he had agreed that he should not be prosecuted. I told him I would see Marks. He said: "Chapman, you don't know how this thing has worried me. I have lost over ten pounds of flesh, my political enemies down at Fresno are throwing this criminal charge in my teeth all the time, and it is worrying myself and wife almost to death, and I wish you would go and see Marks and have the prosecution withdrawn." He said he was not afraid of the charge; that he would be acquitted on

the trial, but he said it was the idea of having the charge over him that he wanted to get rid of.

G. E. Colwell, a witness sworn on behalf of the defendant, testified as follows:

I am an attorney-at-law, and resided in Fresno from 1886 until 1890. Mr. McWhirter and I were associated in Fresno at one time in publishing the Fresno Democrat. After I came down here in 1890 I only met him once. At the time of his marriage we were associated together in business. About a month or so before his marriage he told me he was going to marry Nannie Blasingame, and he bought a ring from a jeweler named Markwood on credit, I going security for the ring. I know the ring had not been paid for three or four months ago.

CROSS-EXAMINATION.

The sum agreed to be paid for the ring, my impression is, was something over \$100, and perhaps \$150. It was a diamond ring. When McWhirter went out of business with me, to get rid of him I assumed the indebtedness for the ring. This was after his marriage in September, 1889, about that time.

Thomas H. Bates, a witness sworn on behalf of the defendant, testified as follows:

I have lived in Fresno since 1889, and knew McWhirter very well—was quite intimate with him. About three months or maybe more before his death took place, I had a conversation with him in his office in the Fresno Loan and Savings Bank building. I was in his office when the insurance agent handed him

a policy for which Mr. McWhirter handed him two notes. The agent went out, and I made the remark to Mr. McWhirter "Are you getting insurance?" He said, "Yes, I have just got \$60,000 worth"—I am not sure whether he said he had got \$60,000, or was getting that much, and I think he added, "I am going to get" or "going to try to get \$40,000 more." I said, "That is a big amount of insurance, Mac, to carry." He said, "I am doing it for my family's sake." I said, "What are you apprehensive of?" He said, "You know this is going to be a very lively campaign, and there is no telling what might happen before the election is over." I said to him, "From whom do you apprehend danger?" He said, "You know my enemies." I said, "I don't share in your fears whatever." He says, "You can't tell," very emphatically, "there may be a quarrel, and I may get killed or may kill somebody else," just like that, "and I don't want to leave my family without," I believe "without something. I don't want to leave my family without something."

I recollect Mr. McWhirter took a very active part in the election of Mr. Church as an Assemblyman from the First Ward. That was in the election of 1891. Mr. McWhirter exercised all the power and influence that he had with the citizens of the ward to secure the election of Mr. Church, and in doing so antagonized quite a number of Democratic citizens who were opposed to Mr. Church. Some time in 1892 we used to talk, in a general way, of course, about the probabilities of the United States going Democratic in the national election, and Mr. McWhirter always ex-

pressed an admiration for Mr. Cleveland, and a desire to see him nominated and elected, and he sometimes would suggest in his conversations that there would be an element in the State convention which would endeavor to send delegates to Chicago that would be opposed to Mr. Cleveland, and he mentioned some of the more prominent and active. He said he was liable to get into a fight with Mr. Terry, with Mr. Grady or Judge Harris, or any of their friends. He said of course if he got into a fight with them that he supposed it would be a fight to the death, or some words to that effect. That was about the general trend of the conversation. He was prepared for a quarrel, and looked for a fight at any time from any of these sources or their friends. He felt as though it was liable to be a fight at any time. He was ready for it, and supposed it was the same on both sides.

Mr. Thornton—I move to strike out the entire testimony as to declarations as too vague and ill-defined; not the substance of the issue, and has no tendency to support the issue.

(After argument)

The Court—I will deny the motion. I think the testimony may be relevant on other issues in the case; not upon the issue of fraud, but perhaps upon the other issues in the case. The testimony may stand.

Mr. Thornton—We except.

CROSS EXAMINATION.

I judged the election of Church to be the inception of the trouble. I did not hear of any difficulty after Church was elected. It was a very close contest in

that First Ward, and Mr. McWhirter took a very active interest in it.

I recollect the contest that was had at the Democratic primaries in the spring of 1892 over matters in the First Ward. Mr. McWhirter lived in the First Ward.

I recollect that the primary election was held some time in the summer of 1892, but as to the month exactly I could not say, but it was before that time that Mr. McWhirter made those statements to me about the possibility of getting into a fight with parties you have named, or their friends. He never said anything to me about it after the primaries. We had but very little conversation after the primaries.

I don't know the name of the insurance agent I met in Mr. McWhirter's office.

RE-DIRECT EXAMINATION.

I think Mr. Church went into office in the city council in April, 1891; and it was the acts of Mr. Church and several other persons of the council after their election, in relation to certain appointed officers, that created quite a trouble down there.

Mr. McWhirter believed that Mr. Grady, Mr. Goucher and Mr. Terry were opposed to him—that is, they were opposed to letting Mr. McWhirter become any way prominent in politics—in the local Democracy in Fresno. He believed that. The parties were designated as the Triangle. These words were never used in Fresno until Mr. Baker came there, and Mr. McWhirter had left for the mountains in the summer of 1892. When Mr. Baker came up from

Stockton and took charge of the editorial department of the *Expositor*, in the very first issue that word was used—the Triangle. Mr. Baker was living in Mr. McWhirter's house. The triangle were generally supposed to be three of the trustees—Halford, Cole and Vey.

After Church took his seat, I always understood that Mr. McWhirter had come to an understanding with three of the Board. I don't know that McWhirter had any trouble with any of the persons I have referred to.

Between April of 1891 and the primaries of 1892, I used to walk home with Mr. McWhirter. Some time in the fore part of 1892, and before the time this person was in his office with the insurance policy, and before the primary, he expressed his fears that he would not be surprised if he would be attacked in going home after dark. I have only a vague recollection of his having made that remark.

He would ask me to walk home with him in the evening, or something like that. I did not share in his fears at all. When we were walking home and the subject might be brought up he would say, just as I have remarked, he might probably meet with some enemy, or something of that kind, I don't know the exact tenor of his language, but he would express an apprehension of meeting somebody and having trouble.

(The jury was then dismissed, while the following testimony was taken before the Court:)

E. F. BERNHARD.

The Court—Head this “Statement of testimony of E. F. Bernhard, a witness called for defendant, which

testimony was offered on behalf of the defendant and upon objection of the plaintiff, was excluded."

Mr. Campbell—Q. Can you now fix the date of your conversation with Mr. McWhirter, as near as possible?

A. I think it was in the spring of 1889.

Q. The spring of 1889? A. I think so.

Q. Now, will you please state what, if anything, Mr. McWhirter said to you in relation to suicide or in relation to under what circumstances he would commit suicide?

A. The exact conversation I could not state at this time, but to the best of my recollection, it was this, that if he ever did anything that would disgrace himself or his family that he would kill himself, or that he would kill himself if he ever did anything that would bring disgrace upon him or his family.

Q. Is that the substance of the testimony?

A. That is the substance.

Q. Where had you been that evening, if you remember?

A. We had been to a little entertainment at Mr. Grady's residence.

Q. You were going home together, were you?

A. We were coming together. We left together—we walked from Mr. Grady's residence to this point.

Q. That was the substance of what he told you?

A. Yes, sir.

The Court—You might state in what connection this conversation arose.

A. We were discussing, to the best of my recollection, some of the history, you might term it, of another

person, and in that connection this conversation arose out of that.

The Court—That is all; I think the ruling is correct.

Mr. Campbell—I was going to make the following offer—to re-offer this testimony in connection with the testimony that was offered this morning of Mr. Chapman and the record.

Objection sustained and defendant excepts.

Richard S. Heath, a witness sworn on behalf of the defendant, testified as follows:

My name is Richard Heath. I first became acquainted with Louis B. McWhirter in 1890, in Fresno, and I knew him very well. My relations with him were intimate and very friendly. I was residing in the County of Fresno at the time McWhirter met his death. I am the Richard S. Heath who was indicted in Fresno County for the alleged murder of Louis B. McWhirter.

Q. State to this jury whether or not you killed Louis B. McWhirter.

Mr. Thornton—We object that the evidence is utterly immaterial to the issue in this case. It is not whether the defendant killed Louis B. McWhirter, but whether Louis B. McWhirter killed himself.

The Court—Objection sustained.

Mr. Campbell—I make my offer, if your Honor please, to prove by the men mentioned by the witness Bates, Judge Harris, the Superior Judge of Fresno county, Reel B. Terry, the attorney, Mr. Grady, the attorney, and Senator Goucher—those were the men

that McWhirter said to the witness Bates he was afraid of—and I now offer to follow this proof up by putting the same question to them.

The Court—That is clearly incompetent, and the objection is sustained.

Mr. Campbell—I desire to ask one more question, your Honor. Is your trial still pending?

Mr. Thornton—This is a matter of public record, and everybody knows it.

The Court—It is immaterial whether this trial is still pending or not.

Mr. Campbell—Note an exception.

Oliver M. Chaffee, a witness called on behalf of the defendant, testified as follows:

I am the special agent of the defendant and made a careful examination and measurement of the premises, and located all the objects seen on this map accurately.

I got the two photographs which you show me—the one with the coop in it and the other showing the middle fence—from Mr. Lee Blasingame, the brother of the plaintiff.

That map is made on a scale of three feet to the inch, and is made correct, generally and particularly, from the notes furnished by me to the surveyor. At the time I was there, there was a small coop standing at that point. This was between the 18th and 25th of October, after the murder. That was a movable coop, a small affair which anybody could move. The map marked “3” is on a scale of three feet to the inch, and made upon data furnished by me. The coop marked “4” is a small, movable coop. That which is a small, movable coop on one map and “3” on the other is a

small chicken house—what might be called a permanent house. It is larger and higher. Mr. Thompson, the attorney, spoke to me about them, and pointed out to me all the various points of interest, so that I might not overlook anything. I accepted his statements at the time. He assured me at the time that I was making my measurements that the coop stood in the place it did at the time of the shooting. Mr. Thompson was there when I made most of those measurements. I cannot say he was there every moment. I think I began with the bullet that went through the back of the water closet. After having taken such measurements as would enable me to plot the position of the water closet with reference to the fence, I proceeded to take the measurement which would indicate where these bullets passed, so that I might make a map. I measured the position of this bullet that went through the back of the water closet, the distance from the side of the water closet, and the distance above the ground. There is nothing to show the distance above the ground on this. It is simply a plan, a projection.

I am a civil engineer, having been educated as such. The elevation of that bullet, the distance above the ground, was three feet and eight inches. That is my recollection. It was less than four feet that bullet passed through the fence. I went round from the alley into this yard, and entered this woodshed at that time. I discovered the position of where some bullet had struck on the opposite side. I measured that distance from here. I then drew a string through these two holes, made it fast to the water closet, and found the position of this bullet to be six inches lower

than a direct line through the hole. That is the bullet that went through the back part of the water closet and the fence. I then proceeded to examine the bullet that was in the eaves of the water closet, and that bullet was about seven feet from the ground. The exact distance I don't recollect. There was no bullet at this place, but a mark where the bullet had struck. Then to the left a short distance from this opening there was another bullet at an elevation of perhaps $2\frac{1}{2}$ feet from the ground. That went down like that in about such a direction as that (showing), striking the ground before it went very far. There were two other bullet holes that I discovered. They were about four feet above the ground, about the same elevation. I went over in the alley and discovered two marks of bullets in the opposite fence—what I judged to be bullet holes. After that I proceeded to ascertain whether possibly these bullets might have been fired from one point, or whether they perhaps might have been fired from more than one corner. Placing myself exactly on this line, and by stooping down I could look through these two bullet holes—the one in the rear of the closet, and the other in the rear of the fence. I could adjust myself exactly on it, just as if I had a straight pole like this. Previous to that I had inserted this one in the hole that was up in the roof of the closet—in the gable end of the closet. I inserted this cane in that hole. I placed myself carefully on this line directly through the back of the closet and the fence where the bullet had passed, and when I stood up and looked in the direction of this hole this pencil was exactly in line towards my eye, and then

when I turned round like this (showing), being at about this distance from the fence, I looked directly down through that hole exactly. I experimented further. If I moved an inch this way, I being still on the same line, I would find that the direction of this pencil would be over my line of view, and if I looked around this way that hole was partly closed. If I moved back an inch or two, the reverse operation took place. If I stepped to one side a little bit, I could not see through the two holes in the back of the closet and the fence. That was the effect of the thing. After that I put my pen and pencil in these holes in the alley fence, the McWhirter fence, and stepped back to see where these two lines would come together, which I found was at the point indicated on the map. After taking these out of the holes I went into the alley and looked through the holes in this direction (showing), and found that my lines of sight came together at a point a little back of that, at the point "8"—so that it appeared to me that these bullets had passed from a point near the point "8." All of these bullets passed outward from the yard, none of them inward.

Mrs. McWhirter, I think on the 18th of October, the same day, stated that they had detectives out at work, trying to find out who had murdered Mr. McWhirter; that they had facts in their possession; that they had traced out a great many reports which had been made alleging that this was a suicide, and that in every case they had traced them home to parties who were raising the suicide theory.

Mr. Thornton—I move to strike that out. That is the opinion of Mrs. McWhirter as to certain results in regard to persons.

The Court—I don't think that is testimony. I am very clearly of the opinion that this testimony is not pertinent. The objection is sustained.

Mr. Campbell—We except.

Mr. Budd—Q. Did Mrs. McWhirter at that time say anything to you about having received a letter of instructions, or received instructions from her husband as to what to do in case of his death?

Mr. Thornton—We object as immaterial, utterly immaterial. Probably she was not asked.

The Court—Objection sustained and defendant excepts.

Mrs. McWhirter knew that I was there investigating the cause of the death. I explained that fully to her. I asked her for a full statement in regard to this matter. I do not remember of her ever at any time telling me that her husband had left a letter of instructions with her.

CROSS-EXAMINATION.

I was first charged with this investigation in October, 1892. I don't know whether there was a bullet imbedded in the roof of the water-closet or not. I never saw the bullet.

Lee Blasingame, a witness sworn on behalf of the defendant, testified as follows:

I never saw the two photographs which you show me until I came here. I ordered the photographer to take some photographs of some parts of the grounds. I

don't know whether these are the photographs or anything about that.

Mr. Budd—We offer in evidence the transcript of the judgment in the case of the Fresno Company, against Louis B. McWhirter, and in connection therewith a satisfaction of a portion of the judgment by a note and a release, by a note which Mr. McWhirter got his wife to give for him.

Admitted in evidence, and considered read to the jury.

Defendant rests.

The plaintiff to maintain the issues on her part introduced the following evidence:

Lee Blasingame, a witness sworn on behalf of the plaintiff, testified as follows:

I am a brother of the plaintiff in this case. In reference to the deed marked "Exhibit 11," would say this is a piece of property that I bought from R. W. Tully of Stockton, for which I paid the sum of \$15.00 per acre. I subsequently sold the property to my sister for an advanced price, and subsequent to that I sold the property for her for the sum of \$4,000. I never received any money from my sister in consideration of the transfer, but when the transfer was made by her, I received the consideration. My sister, I think, received \$175 of that consideration.

CROSS-EXAMINATION.

I bought this property from Tully in 1888 or 1889, or possibly in 1890. I got a deed for it. I paid \$15.00 an acre, and sold it for my sister for from \$20 to \$25 per acre. I sold it for her to the other party

within a year after selling it to her. She told me I had better sell it. She owed me the difference. She did not pay me anything at the time, nor give me a note for it. I either paid Mr. Tully or gave him a mortgage. I sold this to my sister prior to her marriage, and sold it for her about eight months or a year after her marriage. I got a deed from her which I gave to the party who bought it. I charged her a certain interest and expenses I had paid. I made all the calculation myself. She never knew anything about it.

I don't recollect whether I ever paid Mr. Tully a dollar on this property.

I either paid him at the time I bought it or subsequently.

Before the coroner's jury went to the vacant lot next to Mrs. Southworth's I went there one evening at sundown or just about sundown. The first time that I saw that the tree was moved from its old position in the grass where it had lain a good many years and the imprints of the tree was made in the grass, and where it had imbedded itself on the ground, I took the tree back and placed it in its exact position as near as we could to ascertain how much of a club had been removed from the tree. I found the tree three, four or five yards from the fence. I cannot say that this was after dark. It seems to me it was about sunset or a little before sunset.

This was before the coroner's jury were taken to the premises. I think I was present most of the time that Mr. Bury was being examined at the coroner's jury. I do not remember hearing Mr. Thornton ask

Mr. Bury what he would say if no sawdust was to be found at the place where this tree was sawed. I do not remember the examination of Mr. Bury as to the sawing of that piece of wood in that lot. I may have been present at the time and I may not—I cannot say about that. At the time the log was put back I think Mr. Thompson, Mr. Thornton, my brother and Mr. Zeigenfuss were with me. I do not remember anything being said about the log having been brought back from where it was sawed to its original position.

Q. Is it not a fact that within six hours after McWhirter's death you were looking for evidence of his having used his saw for the purpose of sawing these clubs?

Objected to as immaterial. Objection sustained and exception.

RE-DIRECT EXAMINATION.

I think that bough had been moved from the place where the imprint was on the grass from 7 to 8 or 10 yards. At the time that I moved it back I had been told that the witness Bury cut this bough.

RE-CROSS EXAMINATION.

The only object in moving it back was to find out how big a piece Mr. Bury had cut out.

Mrs. N. S. McWhirter, a witness called on behalf of the plaintiff, testified as follows:

I am the plaintiff in this action. I remember selling the property described in Exhibit No. 3 to Mr. Rorden, and to the best of my recollection that is a copy of the mortgage. The original amount of that is

\$150. I remember one fifty, and there may have been two 50's paid after my marriage.

I remember a mortgage given me by J. A. Lane for the purchase of some property, some time in 1888. The mortgage was released some time after I was married. I don't remember what the moneys received on either of these mortgages was used for. I don't remember that mortgage given by a man named Foeber for \$400. I know it must have been done, but at the same time I don't remember it.

Exhibit No. 6 is a transfer from me to my mother of some lots, and I made \$20 on the transaction. I used that money in a general way.

Exhibit No. 7 is a mortgage from me to the Farmers' Bank. I borrowed that money from the Farmers' Bank, and used it in various ways. I cannot state now.

I recollect executing a mortgage to the Fresno Loan and Savings Bank for \$1,500, on the 15th day of May, 1889, and used the money to make some improvements on property in which I resided and have resided in ever since. At that time I spent more than \$1,500 for the house, and afterwards for office furniture—law books and office furniture.

I recollect executing a mortgage about the 31st day of May, 1892, to the Fresno Loan and Savings Bank for \$1,000, but do not recollect what that money was used for.

I recollect executing a mortgage to the same bank for \$400, on July 31st, 1891, which I used to go to San Francisco with my baby, who was very ill at the time, and used it for that purpose.

I recollect executing a deed of certain property in Fresno for \$700, and an additional \$100 for the choice of four lots which we owned jointly. I received that before my marriage, and used the greater part of that in buying clothes.

I recollect making a deed about the 28th of September, 1888, to J. A. Lane, but do not recollect what the consideration of the deed was.

At the time of my husband's death I had some lots with brother, Oliver Blasingame. They were undivided at the time we purchased them, and he simply took the deeds.

As near as I can remember, the street grading on the lots I owned in the city of Fresno in 1889 and 1890, was between \$275.00 and \$325.00. I also had taxes to pay at the time on all the property that I owned.

Before I was married I was acquainted with Mr. McWhirter's financial condition. He had sold his interest in the Democrat the September before we were married, and I understood that he had from that \$1500 or \$2000—that he had sold his interest for that.

On the 28th of August, 1892, Mr. McWhirter was in perfect health. He was of an unusually cheerful disposition. I rarely knew, or never knew him, in fact, when you could say that he was despondent or lacking in hopefulness.

With reference to his actions and disposition on Sunday, the 28th of August, 1892, after his death it seemed to me for a time that he was unusually affectionate, and yet, in thinking it over, I cannot see that his conduct was any different from any other time in

his life, because he was always of a very affectionate disposition, and always very attentive to both myself and our little boy.

I don't remember stating to any person that Mr. McWhirter had said on Sunday, the day before his death, anything about how the house was to be fixed, or fixing the house in case of his death.

Mr. Thompson—I wanted to ask her whether anything was said between herself and her husband.

Mr. Budd—I object as immaterial and incompetent.

The Court—I think you may ask her whether or not he made that statement.

Mr. Budd—Exception.

The Witness—I do not now recollect any such statement.

Mr. Thompson—Q. How often, Mrs. McWhirter, did you and Mr. McWhirter discuss and talk over the subject of training and education of your child?

Mr. Budd—The same objection, that these declarations we cannot contradict, and we can only contradict the statements made by the lady who is on the stand.

Objection overruled and exception.

Q. About how often?

Same objection, ruling and exception.

A. I suppose a dozen times a month from the time he was about fifteen months old. The child was born on the 29th of December, 1889.

I know Mrs. J. A. Lane. I used to see her every evening for three or four months. She came to my house every evening to deliver milk.

I know Mrs. L. R. Williams, but am not socially intimate with her. From the time she moved away

from next door to the time of Mr. McWhirter's death, I think she visited me once when I was ill for some time.

I have seen very little of Mrs. Linforth, and never was intimate with her. We probably exchanged calls once in two years.

At the time we were married I think my property was worth from \$12,000 to \$14,000, and at the time of my husband's death there was an indebtedness on the property of from \$3200 to \$3500.

John S. Eastwood, a witness sworn on behalf of the defendant, testified as follows:

I live at the residence of A. M. Clark. The sound of repeated firing awoke me on the morning of the 29th of August, 1892. I made a mental calculation of the shots, and I heard six or seven shots—I am not positive. There was a group of shots, then a pause, then another group of shots followed. I cannot tell how many shots there were in the first group, but there were three in the last group. I also heard the sound of screaming, but could not tell whether or not I heard any of it after the shooting began and before it ended. I cannot remember of hearing anything else except the screaming.

It seems to me that I heard a groaning sound.

Mr. Campbell—I move to strike out what it seemed.

The Court—I think it may stand as it is.

Mr. Campbell—Please allow us an exception.

I cannot distinctly call the sounds of the groans.

CROSS-EXAMINATION.

I was certain there were six shots, but not any more.

W. R. McFarland, a witness produced on behalf of the plaintiff, testified as follows:

I am employed as a detective by Harry N. Morse, and was in Fresno a short time after the death of L. B. McWhirter, having been employed by his widow. I arrived in Fresno on the 2d of September, after the burial of the deceased, and visited the premises a short time thereafter. A few days after I arrived there either you (Mr. Thornton) or some of the family sent for me to examine the middle fence between the chicken yard and the main yard. There was a certain barley sack there that was one of several others that had been tacked along the fence. It was a whole sack, that is there were two thicknesses of the sack tacked on the fence. The hole was through both. The hole from the main yard was a small hole, not very ragged—a pretty clean cut hole. The hole on the other side of the sack was larger and somewhat ragged. The edges of the thread were fresh and showed a fresh appearance as distinguished from the weather-beaten appearance of the balance of the sack, so much so that my judgment was that the hole had been made through those sacks at a comparatively recent date—I should think in the summer time. I don't believe I subsequently examined the edges with a magnifying glass. The sack seemed to have been bulged out towards the chicken yard, as though whatever made the hole had come from the yard toward the chicken yard.

The hole in the sack on the south side of the yard was the smaller. I suppose I could have stuck my finger in it easily, or stuck a pencil through it. I think the hole was perhaps not so large as a dime.

In the course of my life I have seen a good many bullet holes through fabrics of cotton, wool, linen, silk or flax. I have seen men killed, and shot through their clothing.

CROSS-EXAMINATION.

I cannot recollect that I have seen any bullet holes through sacks before this.

RE-DIRECT EXAMINATION.

The hole on the south side of the sack was apparently a round hole, portions of the fiber being cut away. The edges of the shred or fiber were fresher and brighter and newer in color than the surface of the balance of the sack. The balance of the sack had the appearance of being a weather-beaten sack. The edges of the hole were nearer the color of a new sack—one that had not been in the weather.

The hole on the northern side of the sack was more irregular in appearance, and was longer one way than the other, its greatest length being up and down, the bottom of that hole being a little lower than the bottom of the hole on the south side of the sack.

After I had examined the hole on the south side of the sack, I stuck my pencil through the holes in the cloth, and the course of the pistol, instead of being at right angles with the face of the fence, was at an angle say, perhaps of 45 degrees, and whatever made the hole must have just missed the outer edge of one of the slats and the inner edge of the other, and the direction was downward.

I sighted the direction a ball would take in making these holes, and found it would have struck the ground

a few feet of the fence. That is, say, six feet from the hole in the sack.

I was sent for again in a day or so afterward, and saw a bullet in a board that was nailed to a fence on the south side of the division fence between the McWhirter's yard and Mrs. Southwood's yard. I think it was rather close to this corner and along that line of fence right there. The board was nailed on the fence below the base-board or stringer. It was tacked on below and one edge of it was on the ground. I don't remember whether it was redwood or pine. I got down on my knees and looked at the bullet hole in the board. The board was not removed from the fence in my presence, and I never saw it again. The bullet was not entirely imbedded in the board, but had struck the board at an angle of about 45 degrees, and had gouged a furrow out of the board before it stopped. The wound in the wood had been made so recently that it was new, and had not been made a great while.

The bullet was a new bullet, and had not been in that board a great while. I took a sight of those holes and found that that shot might have been fired from a point just within a few feet of the gate inside the yard, or it might have been fired from the outside of the yard in the alley by a person standing and shooting over the fence. Either position might have sent a ball in the direction that that had taken.

CROSS-EXAMINATION.

The hole in the sack is between two and three feet above the ground, and the bullet struck the ground about five feet from the sack. I did not make a search

for the ball. I never saw the bullet or anything of that kind, and never went over to the north side of the yard to see whether there was a bullet there or not. I found this little 32 bullet in the board four or five days after I found the hole in the sack.

At the time I saw this hole in the sack I saw a chicken coop in the corner of the yard. I am unable to say whether that corner at the time I saw the hole in the sack was entirely filled with coops. There were some boxes, I think, in that yard—perhaps in the corner.

Q. When you saw the bullet in the board, how far was the bullet in that board from the corner of the fence—I mean out toward what is marked stable here. Give your best judgment?

A. You mean from the stable in there, from this corner.

Q. Yes? A. I cannot tell you that.

Q. A foot? A. More than that.

Q. Two feet?

A. I think more than two feet. I cannot give you my best impression as to the distance. I do not remember what obstructions were in the corner at the time I saw it.

In reference to where the shot was fired from that went through the sack, I am testifying to what I believe. I have no recollection as to the length of that board, nor no knowledge as to its thickness.

My recollection about that corner is that there were some coops or boxes, one and both in that corner, that were there before my attention was called to that ball. I think they were there at the time I saw that hole through the sack.

I have been requested to appear here as a witness, and have interviewed one or two persons on this case.

I do not know the caliber of the bullet found in that board.

I don't recollect whether there were any more holes than those two in that sack or not.

I cannot tell you whether that bullet was lodged in a plain or rough board, or whether the board was a piece of an old box or a piece of the fence. I paid very little attention to the board.

Mrs. Emma Southwood, a witness sworn on behalf of the plaintiff, testified as follows:

I reside in the house adjoining Mrs. McWhirter's on the north, as laid down on the map, and was sleeping there the night of Mr. McWhirter's death. Some noise awoke me, I don't know what it was, and the first noise I heard after awakening was the report of a pistol. I don't know how many reports I heard. After the second shot I heard there was a terrible groan. Beside the pistol shots and the groan, I heard a shuffling of feet at the back kitchen door of Mrs. McWhirter's—like the shuffling of feet of two or three persons. This was after the pistol shots. They sounded as though coming my way first. I heard Mrs. McWhirter scream after the pistol shots.

I saw Mrs. McWhirter go by the refrigerator to go into the back yard. There was a gas light in her dining-room. They always had a light burning there. She was going out through the back porch. I heard the shuffling of footsteps for a moment, and they faded away in the distance. Myself and daughter dressed almost directly and went to Mrs. McWhirter's.

CROSS-EXAMINATION.

I was very much frightened. I thought there were burglars coming there. I did not hear Tom Rhodes go over there, or tumble over the woodpile.

The groan I heard was Mr. McWhirter's voice. I heard the footsteps before Mrs. McWhirter screamed. I did not see Mrs. McWhirter until after the shooting was over.

I am certain she did not scream until after the shooting was over.

Miss Carrie Southwood, a witness called on behalf of the plaintiff, testified as follows:

I am the daughter of Mrs. Emma Southwood, and live in the next house on the north side of Mrs. McWhirter's. I am not sure what awakened me on the morning of the death of Mr. McWhirter. My mother was near me when I awoke; she was standing at the foot of the bed. Then I looked out of the window and saw Mrs. McWhirter pass by the refrigerator. She came out of her bedroom and I saw her in her dining-room. I heard no pistol shots on that night at all, nor groans. I heard Mrs. McWhirter scream when she was in the dining-room.

Archibald McDonald, a witness on behalf of the plaintiff, testified as follows:

I live in Madera, Madera county, and am County Recorder. I have lived in California since 1849, and crossed the plains to come here. I have a general familiarity with gunshot weapons, rifles, shotguns and pistols. I have been engaged in Indian warfare, and have lived the life of a frontiersman, depending upon my rifle for support and protection.

I was in Fresno a day or two before the inquest on the body of the late L. B. McWhirter, having gone there at your request. I remained there one night and a day, or two nights—I don't recollect. I knew Mr. McWhirter quite well. I visited the premises in your company and some others.

I saw a barley sack tacked on the north side of the middle fence, about $13\frac{1}{2}$ or 14 feet from the rear fence. I saw a hole through that sack. There were two thicknesses of the sack. The size of the hole on the south side, or the side nearest the fence, was about the size of a 5-cent piece, or a dime probably, and the hole on the north side of the sack was larger—probably it would take a nickel to cover it. The sacks were mildewed; they had been there the winter before, I should judge, and on the south side the hole was not very observable. It did not show any fresh threads that were broken, but on the north side, on the inside of the chicken corral, the threads, where they were broken off and carried away, were fresh.

I subsequently saw a plank or board in the north-west corner of the chicken yard, about six inches wide and seven or eight feet long in length, at least, which had a bullet in it. The bullet evidently entered the board at an oblique angle, and had plowed along the grain of the wood some three-fourths of an inch to an inch before it had imbedded itself. It was not entirely imbedded. The butt of the bullet was still visible.

The board was an old, stained board, and this fracture had been evidently made since any rain had been

on the board. I thought the bullet had not oxydized any, the inside of the bullet showing bright lead where it had mashed—abraded. The abraded part of the bullet was bright. The part exposed to the surface had about the general color of bullets that have been moulded some time for cartridges, etc.

I knew very well what I was looking for, and I sighted to see where the shot could have been fired from. I saw at once that the shot could not have made two holes unless the bullet had struck the ground and ricocheted, and the direction would take it out about where the gate in the main yard is. My impression at the time was—of course, it was only conjecture—I thought the fellow had fired it from the outside of the gate from the alley there, but he could probably have fired it from the inside. I think both things are possible.

I never saw anything abnormal in McWhirter's disposition. I thought he was very cheerful as far as my intercourse with him went.

CROSS-EXAMINATION.

The bullet was pretty close up to the corner of the chicken yard, within two or three feet of the corner.

The edges of the hole on the south side of the sack were round, as if a bullet had gone in there, and the threads were pushed inward.

W. W. Raims, a witness produced on behalf of the plaintiff, testified as follows:

I live in the Central Addition to Fresno, about a block and a-half from the McWhirter residence. At about three o'clock the morning that McWhirter was

killed, I got up and went out to the water closet. I returned to the house and had just turned the cover back to get into bed when I heard two shots, as close as could be, then there was a little pause, then there was one shot, and then four shots—seven shots altogether. I think I counted them mentally as they came.

I have used firearms ever since I was a boy. It is my opinion that the first two shots could not have been fired out of the same pistol.

Mr. Budd—I object that the witness could not tell. No other man could tell. He can describe them. It is for the jury to tell. I move to strike it out.

The Court—I think the answer may stand.

Mr. Budd—We except. Our motion is on the ground that it is incompetent, and the witness could not tell.

The Witness—Immediately after the shooting I run to the front door. My doors and windows were all open. Just about the time I got to the front door I heard a light wagon start from near the place of the shooting or beyond it, a little from my place, and drive to the north end of town. When I ran to the door I also heard a woman scream. That is all. I did not hear any of the screams until after the shooting was all over.

CROSS-EXAMINATION.

One man could have fired the last four shots. I don't think a man could have fired one pistol twice as quick as these first two shots were fired. A man holding two pistols in his hands could have fired them. I did not notice any difference in the sound of the shots. It was all very keen and sharp, and none of it muffled.

Mrs. M. E. Raims, a witness sworn on behalf of the plaintiff, testified as follows:

I am the wife of the last witness, and was living with my husband in Block 6 of the Central Addition on the night of the death of Mr. McWhirter. I was not awake at the time the shooting began. I supposed that the first two shots and my husband returning to bed woke me. I counted five shots on that occasion. There were pauses between each shot in a way that you could count them, as I remember. I could not say whether or not there was any pause between the first shot and the last four shots, because I was so excited at the time it was something hard to tell. I don't remember as to that. I heard a buggy directly after the shooting. I heard Mrs. McWhirter when she gave the first scream, which was directly after the last shot was fired, as near as I can remember. My house is about twenty feet back from the edge of the sidewalk. I don't think I heard any groans.

CROSS-EXAMINATION.

All I know about the shooting is that I heard five shots, and they seemed to be the same length.

Stewart S. Wright, a witness called on behalf of the defense, testified as follows:

I am an attorney-at-law, and the night of Mr. McWhirter's death was sleeping about from 250 to 300 yards from his residence. I was awake a few minutes before the shooting began, and it appeared to me like there were eight shots fired. I counted the shots in my mind as they were being fired. The shots were not

fired regularly. The space between the shots did not seem to be the same. It is so long ago that I cannot testify with any degree of positiveness as to the intervals. I heard voices between the third and fourth shots. They seemed to be hallooing more than screams. The expression seemed to be one of surprise. It was quite a loud cry, and of a male voice. Toward the close of the shooting, or possibly, immediately afterward, I heard expressions of pain, or what seemed to me to be expressions of pain. Afterwards, or possibly near the close of the shooting, I heard what appeared to me to be a female voice in distress, and that caused me to go over. The female voice was after the male voice. After I heard the shooting on that morning I got up and dressed as soon as I heard the cries of distress, awakened Mr. Miller, and we went over in the direction of the shooting.

CROSS-EXAMINATION.

It is possible for one man to have fired all the shots, yes, sir. It seems to me there was an interval after the first six shots, but that may have been in my mind, I cannot tell. I was waiting for the sixth shot, and when that happened, I said to myself there would be no more shooting. I could not swear as to the interval. I would not be willing to say now that there was any pause at all. I know there was one shot after the sixth, but I think I heard another one. I did not notice much of an interval during those six shots. I cannot tell whether there were ten shots or not. My best recollection is that there were two shots after the sixth. It seems to me that there was an interval after the sixth.

I slept on the north side of the house, toward McWhirter's residence.

James B. Hume, a witness produced on behalf of the plaintiff, testified as follows:

I am a special officer of Wells, Fargo & Co., and was in Fresno the night Mr. McWhirter met with his death, sleeping in the northeast corner room of the Grand Central Hotel on the second floor. My windows were open on account of the heat. Young Cross, the son of Superior Judge Cross of Visalia, and Frank Bird, were with me. They were in my room, and I was awake in bed. I heard shots coming apparently from the north. I am uncertain how many I heard. At the close of the shooting I counted seven.

What counting I did I did aloud. I don't say that I counted seven shots, but at some stage of the proceeding I began counting and when the shooting ceased 7 was the number I mentioned.

When the shooting ended I requested one or the other of the young men to look at my watch on the stand. My recollection is it was 15 minutes past three. I heard no other shooting that night. There was an interval before the last shot and there was an interval before the two preceding shots. The shots prior to that first interval went right along rapidly, then there was an interval, then two shots, then an interval, and one shot, which closed the shooting. I do not mean to say there was an interval between the 6th and 7th shot, I mean to say there was an interval before the last shot, and there was an interval between the two shots preceding that.

I heard the woman's voice cry murder at least once, and I don't know but twice.

CROSS-EXAMINATION.

I am not certain whether there were six or seven shots. I cannot say for a certainty that I did not commence counting when the shooting commenced, but presumably I did not.

I commenced during the shooting, and instead of saying one I might have commenced at three or four. I don't think there were seven shots. I think there were only six. I know that after the first interval there were not four shots, and I know that after the second interval there was one shot. I am absolutely positive that after any interval the largest number of shots were three.

RE-DIRECT EXAMINATION.

I testified on the Heath trial.

I know John N. Thacker very well. He occupies the same office with me when here. His views are that L. B. McWhirter committed suicide. We talked the matter over a number of times. I testified on the Heath trial that I counted seven, and I testify now that I counted seven. I have given my reason why I think there were but six. I did not intend to convey the idea that I commenced with one. I closed my count with seven. My impression is that I commenced at four, at the first lull. That is my present impression. When the lull came I commenced counting the shooting, and I think I said four when I should have said three.

RE-CROSS EXAMINATION.

Mr. Budd—Q. Do you know on what Mr. Thacker's opinion as to the suicide of McWhirter is based?

Mr. Thornton—We object to that as utterly immaterial.

Objection sustained and defendant excepts.

J. E. Baker, a witness sworn on behalf of the plaintiff, testified as follows:

I am a newspaper man, and at present reside in this city. In the months of June, July, August and September, I was residing in Fresno, Fresno County, Cal.; part of the time I was lodging, part of the time I occupied the house of Mr. Jackson, the major portion of the time I occupied the house of Mr. L. B. McWhirter. The night Mr. McWhirter died I was sleeping at the house of Mr. Jackson, about three and a-half blocks away. On that morning I was awakened by Mr. Jackson, and immediately dressed myself and went down to the McWhirter house, arriving there as near as I can remember from 10 to 20 minutes after 4. It was dawning. I entered by the front entrance, walked around the house and immediately to the rear, and asked some one where it had occurred, and walked to the spot where the killing took place. He had fallen at the point marked letter "B" on that map, approximately. I made but a very brief and cursory examination. Some one told me they had found two clubs, a mask and two pistols. I think a man known as dead-shot Ward pointed me out where it occurred. I think Mr. Babcock then came to me. The only examination I made then of the ground was

right between the lattice and the fence, and directly in front of the water closet. It was very sandy and quite soft. It was not wet, only damp, and there were marks of a footprint there shoved along, which had ridged up the sand, leaving the impression of the marks of the feet as if dragged along in three or four places, all within a circle of five or six feet. I called the attention of Ward to it, and some one then came out of the house and told me Mrs. McWhirter wanted to see me. McWhirter was dead when I arrived there, and the body had been taken into the house. I saw the body, with the chest exposed to view, and the wound. The wound was a round hole right close to the nipple, as though it had gone in at an angle from above and to the left.

I was a soldier for three years and was in quite a number of great battles. I have seen a good many men die who were killed by gunshot wounds in my immediate presence, some in personal conflict. The hole was almost a perfectly round hole. It had filled the size of the bullet that had gone through as though there was no obstacle in the way of its going in, and apparently carried nothing with it. There was slight powder stains, as I could see. They looked like very slight powder stains around the wound, but I did not see any scorch. I made a second examination the same day. At first I thought that the night-shirt and the undershirt were blackened with powder, but when I came to make the second examination I concluded that it was not, that the blood coming from the wound had caused the blackening process on the shirt, the inside of it.

The garments which you show me are apparently the garments worn by McWhirter on that night.

I saw the five bullet holes—three in the rear fence and two in the water closet.

On Monday, a week after his death, my attention was called to a gunny sack nailed or tacked upon the north side of the middle fence. You called my attention to it to the best of my recollection. I think Mr. Lee Blasingame, Mr. W. P. Thompson, Albert Blasingame and Mr. McFarland were present.

The sack was nailed down close to the ground, double width. It apparently had been there a long time, it was weather-stained and somewhat mildewed, and there was a hole through the sack at an angle of from 35 to 40 degrees. The smaller hole was on the south side of the sack, and was about the size of an ordinary bullet, or a little larger than this pencil—about the size of a ten-cent piece, I should judge. It was a clean cut hole, and round, and the edges were new, and bright, and where it was taken off, sharp, almost like they had been cut. The sack sagged a little bit on the north side, and the hole on that side was torn downward. I took a sight through that hole, and whatever passed through there struck the ground about five or six feet on the north side of the fence. There was a permanent chicken coop, a wooden chicken coop, and a wire chicken coop in the chicken yard. My impression is that the chicken coop ought to be at BC (marks on diagram.)

I subsequently saw a board with a bullet in it. The board was part of the chicken coop I think. My remembrance is, it was nailed on in front of it. If

that board was on the fence it was under the stringer. Since I come to think about it, it must have been a portion of the fence. It was down in a low place where I had got on my hands and knees to examine it. This board, according to my remembrance, was 2 or 3 feet long, of pine wood, and less than 15 inches wide, and $\frac{3}{4}$ of an inch long. The bullet took a direction toward the upper left hand corner of the plank. The surface of the plank was old, and the scar was fresh, as though it had been made there very recently. The portion of the bullet which had not been imbedded in the plank looked bright.

I had known Mr. McWhirter for about five years prior to his death. He was very cheerful and buoyant, and a man of sanguine temperament. I never saw a more devoted husband.

Mr. Thornton—Q. What was his general conduct and exhibition of sentiment toward his child?

Mr. Budd—We object. These are self-serving statements.

Objection overruled and exception.

A. He was very much wrapped up in the boy; was always talking to him and teaching him things when I was there.

On Sunday, the 28th of August, 1892, I went to the house of McWhirter right after noon and stayed there until about half-past five o'clock, or may be a little later, and possibly a few minutes earlier. I went to the water closet at about 5 o'clock that evening, and had to pass right by the back fence, and I am quite positive there was no hole there at the time.

CROSS-EXAMINATION.

I made my second examination about eight o'clock on Monday morning. I did not find any powder in the flesh. When I examined the wound or looked at it first I thought the smoke the stain of powder. I could not see the powder. At the time I made my first examination I thought I had seen some powder on the flesh. It is difficult to tell whether the appearance of the wound was the same on the second examination. There was a discoloration on the outside of the white shirt. It was not very pronounced, but the discoloration was there. I thought it was powder discoloration. I took it to be such judging from the circumstance attending it. I thought it was a powder stain upon his clothes, and think so yet.

Dr. E. G. Deardorff, a witness sworn on behalf of the defendant, testified as follows:

I have been practicing medicine and surgery since 1879, and now reside in Fresno. I knew L. B. McWhirter in his lifetime and was acquainted with his physical peculiarities and characteristics. I think he was about five feet ten or ten and one-half in height. He was a strong and very well developed man. On the night he died I was residing on the corner of N and Kern streets, in Block 125.

I was awake at the hour of three o'clock on the morning of the 29th of August, 1892. I had a professional call to go to, and was awakened a few minutes past three. I dismissed the case, and lay down a few minutes when I heard the shots. I heard seven. I counted the shots to myself, as the explosions occurred.

I heard one shot, a very slight interval, two shots, a slight interval, and then four shots very close together. The last shot was not so loud as the others. I went to the house the day of the funeral. I did not hear any sounds, or screams, or exclamations or cries from any person at the time I heard the shots.

I saw those garments before the coroner's jury and I examined them this morning in company with Dr. Webb and Professor Price. We made a microscopic examination of the blood stains upon the garments. The power of the microscope we used was 55 diameters. The microscope did not reveal any sign or evidence whatever of powder-burning, particles of powder, ignition or charring of any of those garments.

I examined Mr. McWhirter for the Northwestern and Providence Mutual Life Insurance Companies. I do not know that he expected at the time that he would not live for six months.

Q. Did he not so inform you?

Mr. Thornton—Object, on the ground that it is not proper cross-examination.

Objection sustained and exception.

The Witness—I testified at the coroner's inquest.

Mr. Budd—Did you not testify upon that coroner's inquest that you examined Mr. McWhirter upon March 18th for the New York Life Insurance Company, and on March 23d for the Providence Life Insurance Company, and that he stated to you at that time, "I have a good many political enemies, and I expect really that my life will be attempted, or that I will be killed before the campaign closes?"

Mr. Thornton—I object to that as immaterial.

The Court—Objection sustained and exception.

The Witness—My bedroom is on the side opposite McWhirter's house. I heard seven shots, and the last one was hardly as loud as the balance. There was first one shot, then an interval, then two shots, an interval, then four shots. I live 3,750 feet from the McWhirter residence.

J. E. Baker (continued)—I was at the McWhirter house shortly after McWhirter's death.

The bullet in the board that was nailed to the fence was found back of a wire chicken coop.

On the day before his death Mr. McWhirter seemed to be in very good spirits.

Mr. McWhirter talked about being assassinated because there were certain things existing there. Not that he so much expected a thing as he apprehended that it might happen at any time.

Mr. Budd—Q. Did he not tell you that he was apprehensive of being assassinated, and for that reason he carried \$60,000 life insurance?

Mr. Thornton—I object to that as not cross examination.

Objection sustained and exception.

W. W. Phillips, a witness sworn on behalf of the plaintiff, testified as follows:

I desire to make an explanation of the testimony which I have already given. I was questioned about some drafts that were drawn by Mr. McWhirter through our bank. At the time I had a very indistinct recollection about the amounts and the dates, and upon request I investigated as to the exact amounts, and

also the dates. The first draft was drawn for \$1000 on March 17, 1888, upon his mother, and was paid. The \$250 transaction was on the 21st of January, 1889. I took his draft on his mother, and credited his account, and he drew against that amount as he required it. The draft was paid on presentation. That was a different transaction from the personal loan I made him. I have no recollection of Mr. McWhirter's drawing any drafts on his mother after his marriage. At the time he drew these drafts I took him to be a man of 32 or 33 years of age.

Thomas Price, a witness sworn on behalf of the plaintiff, testified as follows:

I am an analytical chemist, and have studied microscopy. I have been chemist for the California Powder Works for 20 years. I examined those garments which you showed me yesterday under a power of 55 diameters with the microscope, and found in several places here what appears to be clotted blood, and portions of dried blood which had permeated into the pores of the cloth. Dr. Webb and Dr. Deardorff took part in this examination. I found no ignition of any kind or any burning. I saw no indication of gunpowder upon those garments. There was no evidence of burning, charring, ignition or combustion upon the edges of either of those garments.

Dr. E. C. Webb, a witness sworn on behalf of the plaintiff, testified as follows:

I have been a practicing physician since 1862, and from 1862 to 1866 I devoted myself to the treatment of gunshot wounds in the army. I have treated many

cases in which the wound inflicted by the assailant upon the person wounded had been made at apparently close quarters, and recollect three cases where I have seen men attempt suicide by gunshot wounds in the chest. In two of the cases the pistol was held directly against the chest, and in the other case the fellow took the pistol in both hands and fired. In all three of the cases there was combustion or ignition of the clothing worn by the attempted suicide. In one case it set the clothing on fire, because it was made of cotton goods, and in the other two cases it simply burned.

Mr. Thornton—Q. In the first instance in which the clothing was set on fire, what was the nature of the garment, and under what circumstances—

Mr. Campbell—I don't believe that is competent testimony for the gentleman, to show his experience with other cases.

The Court—I don't think that is conclusive, but it may go to the jury for its value.

Mr. Campbell—We take an exception.

The Witness—A. It was a blue flannel blouse, such as privates ordinarily wear.

Q. What was the nature of the weapon in the cases you have observed?

Same objection, ruling and exception.

A. One of the ordinary Colt's, which cavalrymen used to carry during the war.

I was present when a microscopical examination of those garments was made yesterday by Professor Price, Dr. Deardorff and myself, under 55 diameters. We

found no signs of charring or burning of the garments. I saw no discoloration other than by human blood on those garments.

W. J. Tinmin, a witness sworn on behalf of the plaintiff, testified as follows:

I am an attorney-at-law, and on the evening before the death of Mr. McWhirter, my wife and I were at his house. We went there about half-past seven and left five or ten minutes after nine. I had known him for about five years. He was a cheerful, social man, who seemed to look at the world in a pleasant light and was happy in his general demeanor and conduct. I was awake on the morning of the 29th of August and heard the shooting. I counted the number of shots out loud, and there were seven. I could not state the intervals. My recollection is some were very close together, and others were more apart.

Q. Was there anything unusual or different from the ordinary or usual talk of Louis B. McWhirter on the 28th of August?

Mr. Campbell—We object to that on the ground that it is simply the conclusion of the witness and the opinion of the witness from the acts of the party.

(Objection overruled and exception.)

A. I could not see that there was any difference. I should say his family was a very happy family. His conduct was affectionate towards his family at all times.

CROSS-EXAMINATION.

I live about six blocks from Mr. McWhirter's residence. I did not hear any other noise except the shots. My bedroom is on the opposite of my house from the McWhirter residence.

Q. Did Mr. McWhirter tell you on the 28th of August that he expected to be beaten with a club?

A. Not at that time.

Q. He had told you before that time, had he not?

Mr. Thornton—We object to that as not cross-examination.

(Objection sustained and exception.)

RE-DIRECT EXAMINATION.

The windows were all open.

Mrs. W. J. Tinnin, a witness sworn on behalf of the plaintiff, testified as follows:

I am the wife of the preceding witness. I was awake at the time of the shooting and heard seven shots. The windows were open, and it was a very pleasant, quiet night.

CROSS-EXAMINATION.

I commenced to count the shots aloud at the third shot. I heard no screams at all that night. There was an interval between the shots, but I am not prepared to say where the interval occurred. The last four shots were close together and extremely rapid. The interval occurred before the last four shots.

A. E. Wagstaff, a witness sworn for plaintiff, testified as follows:

I reside in Fresno and am a writer and newspaper man, and in the months of August and September, 1892, I was on the "Republican." I live about 1950 feet from the McWhirter residence. I was awake on the morning of the death of Mr. McWhirter at about three o'clock. I heard three shots, and then an interval,

then three more, a pause for half a second, and then two more. The last two shots were more indistinct than the first shots. I did not hear any noises, such as screams, shouts or groans.

Philip Scott, a witness sworn on behalf of the plaintiff, testified as follows:

I am a resident of Fresno and was residing there during the months of August and September, 1892. I was a member of the coroner's inquest, and with the remainder of the jury went on the last day of the inquest to the McWhirter premises to examine a certain gunnysack which was located there (indicating on map). I think there was only one thickness of the sack. We went up to examine for a seventh bullet, that hole having been found in the sack. It was about the size of a dime. I examined the edges of the hole, and it had the appearance of being a fresh hole; the edges were slightly ragged. I subsequently saw a bullet in a plank in position in this corner of the chicken-yard, (indicating) about four feet from the corner, I think. We examined it closely with the naked eye. I don't think we used a glass. I think the bullet in the plank was four or five inches above the ground. The bullet had the appearance of striking the plank sideways, and it had torn up the surface of the plank a little, and the tear had a new appearance, as though it might have been made recently. The bullet had the appearance of being a fresh bullet.

I subsequently went over into a vacant lot north of the Southwood residence, and saw a branch or bough of osage orange which had been sawed. I did not see any

trace of sawdust, though I went for the purpose of finding some if there was any there. We might have been five or ten minutes looking for the sawdust. Thomas Bury was there at the time. He was mingling with us, but I could not say he was looking for sawdust.

When I first saw the branch or bough of osage orange it appeared to be right in the same place where it had lain for a number of months, with the exception of the portion that was sawed off.

We did not look for sawdust at any other place except where the sawed piece was found. We just looked for it on the ground where the sawdust would naturally fall from the piece being sawed there. Bury did not call our attention to any other place where he had sawed the limb. The bough might have been moved and placed right back where it was. I could not say as to that.

CROSS-EXAMINATION.

When we were in the lot north of Mrs. Southwood's place we——

There was grass on that lot, but it had been eaten and trampled by stock considerably. The whole place was covered over with eaten and dried grass. Mr. Lee Blasingame was there, Mr. Thornton, and Mr. Budd were there. We were asked in the presence, I think, of Mr. Thornton and Mr. Blasingame to go up and see whether or not we could see any sawdust where this log has been sawn through. Nobody told us that log had been dragged back and put in place before the jury came down there. I remember that the grass on each side of the sawn log was up around it as if it had never been disturbed. There was grass growing up

between these limbs. No one called our attention to it that they had ever been moved.

Charles J. Stillwell, a witness produced on behalf of the plaintiff, testified as follows:

I conduct a detective agency in this city. In company with A. N. Warnekros, a gunsmith of Fresno, I conducted a series of experiments there in the month of June, 1893, with a 41 Colt's, using both long and short cartridges, against a piece of cotton fabric, I think a piece of pillow slip. I have the piece of fabric with me—(witness produced it). The cloth was tacked up against a wooden upright in the basement of a building, and behind the fabric we placed a lot of stuffing from an old lounge and pressed hard to make about the same resistance, as we supposed, the resistance would be of a human body. At the point marked one foot on that fabric, when we fired at it with the pistol one foot away, the fabric immediately caught fire, and we had to put it out. I can't remember, but I think when fired at at one foot and a-half away, the fabric caught fire. The fourth and fifth did not catch fire. When we fired at the fabric at one foot away with a 41 long cartridge, it caught fire. It did not blaze, it smouldered.

CROSS-EXAMINATION.

That was dry and against a dry fabric. There was no moisture back of it, and no blood to spurt out.

I made these experiments during the Heath trial, as a detective in the employ of Mrs. McWhirter.

B. M. Hogue, a witness sworn on behalf of the plaintiff, testified as follows:

In August and September, 1892, I was residing in Fresno, and was a member of the coroner's jury who inquired into the death of L. B. McWhirter. I know Thomas Bury, the detective, by sight.

I went with the remainder of the coroner's jury to the McWhirter premises, on the last day of the inquest, and saw a certain gunnysack attached to the middle fence. It was of two thicknesses. My attention was called to a hole on the side of the sack nearest the fence. It was a small hole, I think about half an inch in diameter, and looked as if recently made. It was fresh. The sack looked as if it had been exposed to the weather for some time.

I also saw a bullet in a board in the corner of the chicken yard. The board, I think, was a pine board about 10 or 12 inches wide, about two feet in length, and an inch thick. The ball appeared to have a little upward tendency, and made a rip or scar in the board. My recollection is that the rip or scar appeared as if it had been recently done.

With the rest of the jury I also went into the vacant lot north of Mrs. Southwood's house, and saw a bough or branch of osage orange in the lot. Thomas Bury was present on that occasion. The object in going to the lot was to look for the sawdust made by sawing that bough or branch. We could not find any sawdust.

CROSS-EXAMINATION.

The grass around that bough which had been sawed had lain there for some time and made a perceptible mark on the ground. It is possible the butt of the

tree or branch might have been moved, but it was lying in its old original place. The top of it had not been moved. I don't remember any one saying that the tree had been moved away 25 or 30 feet and then carried back again. We looked around the tree for the sawdust. When the place between the two logs was pointed out to us to look for the sawdust, Mr. Blasingame was with us. I don't know that he pointed out the place particularly.

Lee Blasingame, a witness sworn on behalf of the plaintiff, testified as follows:

Q. When and from what person was the first time you ever knew or heard of the sawing by any person of that branch or bough of osage orange in the vacant lot adjoining Mrs. Southwood's house?

Mr. Budd—I object to that as incompetent and hearsay.

Objection overruled and exception.

A. From Mrs. Southwood and her daughter. At the time I replaced that limb in its original position I had been told by Mrs. Southwood that the log had been taken down there. I learned that it had been sawed before I replaced the bough to the best of my recollection.

CROSS-EXAMINATION.

The piece I carried back was all in one piece. I found out that Mr. Bury had sawed that tree after I had taken it back to its position. I took it back to ascertain the length of the piece that was cut out of it. If I answered Mr. Thornton that I learned that before I replaced the bough I answered incorrectly.

William O. Blasingame, a witness sworn on behalf of the plaintiff, testified as follows:

I am a brother of the plaintiff. I arrived in Fresno on the night of the Monday on which Mr. McWhirter met his death, and resided at my sister's house. I was present at the coroner's inquest all the time. I saw a gunnysack upon the fence which divides the chicken yard from the main yard. I don't know when that sack was put there, or who put it there. It was a whole sack. There was a hole on both sides, as though something went through—that is, making two holes in the sack, or one hole through the two. The hole on the side nearest the fence was about the size of between a dime and half a dime. The hole was round, and looked new. The hole on the north side of the sack was about the size of a quarter. The direction of the flight of the object which had caused those holes was downward. I subsequently discovered a bullet in a plank in the northwest corner of the chicken yard. It was a common pine board, about between two and three feet in length and 10 inches in width and one inch in thickness. The bullet had plowed a little furrow in the plank. The rip or scar was fresh; it was new. When I discovered that bullet I discovered it through a wire chicken coop standing in the corner. The bullet looked new to me.

CROSS-EXAMINATION.

I saw no other holes in that sack. I found no other bullet holes there.

C. J. Lyons, a witness sworn on behalf of the plaintiff, testified as follows:

I knew Louis B. McWhirter in his lifetime, and also one Clem Carroll, and was present in Fresno when a primary election was held there about the first week in May, 1892.

Q. Did you see any assault made by the said Carroll upon McWhirter?

Mr. Campbell—We object to that, if your Honor please, on the ground that it is incompetent and irrelevant and immaterial.

Objection overruled and exception.

At the closing of the polls Mr. McWhirter had stepped out. He was in there about closing time; several parties were there. I heard McWhirter say, "Why did you strike me?" I stepped up then to McWhirter, and saw Clem Carroll pull a six-shooter on him. McWhirter said, "Why did you strike me?" and Carroll said, "I understand you have been talking about my relatives." McWhirter said, "I don't know you, or your relatives. I don't know what you mean." Then John Meares stepped up. I don't know what he says, and Carroll said for "him to give up his gun and I will give up mine." McWhirter said, "I have nothing to give up." There were a few more words spoken. Carroll backed out into the middle of the street, and then wheeled and went down Merced street. I did not see any pistol on McWhirter on that occasion.

John L. Meares, a witness sworn on behalf of the plaintiff, testified as follows:

I knew Louis B. McWhirter, and knew Clement Carroll by sight. I was inspector at the primary election held in Fresno in May, 1892.

Mr. Thornton—Q. Did you see any affray or assault between McWhirter and Carroll?

Mr. Campbell—Subject to the same objection as we took to the other.

Same ruling and exception.

Between 7 and 8 o'clock in the evening, and as I walked out of the place where we had the polls, I saw Mr. McWhirter standing like this, and as I walked up I heard him say: "Why did you strike me?" and I saw Carroll standing with a pistol in his hand leveled at McWhirter. I walked between them, and Carroll said: "Take McWhirter's pistol and I will give you mine." He said that several times, backing all the time.

I turned to McWhirter and asked him if he had a pistol.

Mr. Campbell—I object to that. It is hearsay testimony.

Objection overruled and exception.

Mr. McWhirter produced no pistol. In response to McWhirter's inquiry as to why he had struck him, Carroll said: "You have thrown us down."

Wm. F. Smith, a witness produced on behalf of the plaintiff, testified as follows:

I am an architect, and am accustomed to use carpenters' tools. The saw you present to me is in rather poor condition. It is a crosscut saw. I am also familiar with the filing and setting of the saws. About 7 and $\frac{7}{8}$ inches from the rear end of the saw there are two teeth that have been gouged—a piece of metal gouged out, and one piece that has been broken a

little. Those teeth would have no effect in sawing, or upon the material sawed.

Mrs. Elizabeth N. McWhirter, a witness sworn on behalf of the plaintiff, testified as follows:

Louis B. McWhirter is my son. I could have at any time on twenty-four hours' notice raised from \$5000 to \$10,000, if necessity required it, to assist my son. I remember my son making a draft on me for \$1000 and \$250. Before that he had not called on me for any money for several months—six or eight months, I think. Prior to his coming to California he lived at Nashville, Tennessee, and for two or three years before he left Nashville he at times gave me money. For the last three or four years while he was in Tennessee I don't think he called on me for any money.

CROSS-EXAMINATION.

My son was thirty-eight years old. I never furnished him with any money after his marriage.

The foregoing is the substance of all the testimony used on the trial of said action that is necessary to explain the questions raised by defendant's motion for new trial.

Be it further remembered, that after the arguments of counsel for defendant and for plaintiff, the Court gave the following instructions to the jury:

The Court—Gentlemen of the jury, the plaintiff, Mrs. Nannie S. McWhirter, sues the defendant, the Connecticut Mutual Life Insurance Company, for \$15,000 upon a contract of insurance upon the life

of her late husband, Louis B. McWhirter, made payable to her as the beneficiary.

The execution of the contract, the payment of the premiums, and the death of the insured, are all conceded facts, and the only matters upon which you have to pass are the defenses which the defendant makes to the plaintiff's right of recovery.

These defenses are two-fold: First, that the insured committed suicide; second, that in applying for the insurance he fraudulently concealed facts which it was material the defendant should know.

Concerning the defense of fraudulent concealment, the defendant alleges in its answer that prior to making application for the insurance said Louis B. McWhirter had difficulties of a personal nature with certain persons, and said persons had threatened to murder him whenever opportunity offered; that said threats were believed by said Louis B. McWhirter, and he feared his life was in danger; and that he fraudulently concealed said facts from the insurance company, and that thereby the policy is rendered void and of no effect.

In the application for insurance the applicant made answer to numerous specific inquiries concerning his health, his personal and family history. Then followed a general question in words as follows: "Is there any fact relating to your physical condition, personal or family history or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?"

To which the insured answered "No."

I instruct you that the law is this: If a general question is put to the applicant for insurance, calling for information from him concerning any fact in his personal history which the insurance company ought to be made acquainted with, the concealment of a material fact will void the policy, though such concealment be the result of accident or inadvertence, and not of design, for it is the duty of the insured, in response to such general question, to disclose all material facts within his knowledge, and I leave it to you to determine: first, whether the said Louis B. McWhirter's life was threatened and in danger from the violence of others, and he knew that fact at the time he made the application; and, second, whether that fact was a material fact which should have been disclosed to the insurance company; and if you find that such threats had been made, and that such danger existed and he knew it, and that the facts so withheld from the knowledge of the insurance company were material facts, then your verdict should be for the defendant.

In considering the materiality of the information so withheld, if any there was, you are not to be guided or influenced by the fact that Louis B. McWhirter actually lost his life by violent means, but you are to determine the materiality of the facts by reference to the probable and reasonable effect upon the insurance company. Would the insurance company have been influenced by these facts in determining whether or not it would accept the risk and enter into the contract of insurance?

You are further instructed that any threats, the suppression or concealment of which by the deceased

would constitute a defense to this action, must be actual threats of bodily harm by third persons known to the deceased, and which would affect the fears and apprehensions of a reasonable man, and that mere rumor or apprehensions of the unlawful acts of personal or political enemies not amounting to tangible or specific threats of bodily harm or injury would not even if concealed from the defendant, constitute a defense to this action.

The applications upon which these policies of insurance were issued were made on November 19, 1891, and March 7, 1892.

The evidence on this branch of the case consists wholly in the declarations or admissions of Louis B. McWhirter himself, made subsequent to the time that these contracts of insurance were entered into. Witnesses testify that he made certain statements to the effect that on account of threats and dangers of death by bodily violence he has taken up the amount of insurance which he was then carrying upon his life.

Since these admissions were verbal I deem it proper to instruct you concerning the force and effect of that class of evidence.

A standard authority upon evidence says: "With respect to verbal admissions, it may be observed that they ought to be received with great caution, the evidence consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also that the witness by un-

“intentionally altering a few of the expressions really
 “used gives an effect to it completely at variance
 “with what the party actually did say. But where
 “the admission is deliberately made and precisely
 “identified, the evidence it affords is often of the most
 “satisfactory nature.

“The burden of proof of the allegations of fraudu-
 “lent concealment rests upon the defendant, and
 “must be established by a preponderance of evidence.

“The evidence in support of the defense of suicide
 “consists wholly of circumstances.”

You have before you the undisputed fact that Louis B. McWhirter was found wounded to death, lying in the rear yard of his residence. At his side was a revolver, with three discharged cartridges. In the fence opposite were found the marks of the bullets, apparently fired from a point near where he fell. In a corner of the yard was found another pistol, with three discharged cartridges. Near the latter pistol were found a mask and two clubs, around one of the clubs was a rope fastened in place by a nail.

Near the same point were three bullet marks, which could have been made by a person standing at a certain point and without changing the position of his feet.

You, as reasonable men, dealing with these circumstances in the light of your observation and experience, and the motives which control human action, are to take these facts, and such other facts testified to as you find to be true, and therefrom decide whether or not the preponderance of the evidence indicated that Louis B. McWhirter came to his death by suicide.

You are to consider in that connection the evidence concerning the rope, the sawdust and the nails. If

you believe from the evidence that the rope found on one of the clubs was cut from rope belonging in the McWhirter yard, you may take that fact into consideration as aiding in some degree to decide whether the rope was cut and placed there by McWhirter, or was cut and placed upon the club by some other person.

You are to consider all of the evidence concerning the finding of the sawdust; the persons by whom found, the nature of the sawdust, and the sawdust found upon the saw.

If you believe from the evidence that the clubs found in the yard were sawed in the premises of McWhirter and by his saw, those are strong circumstances to connect McWhirter with the preparation of these weapons.

There are other circumstances antecedent to the death, none of which would be sufficient in itself to prove suicide, but all of which may be taken into consideration in determining the question which is submitted to you. Such are the facts, that the said Louis B. McWhirter insured his life at the time and for the amounts as shown in the evidence; the declarations he made concerning his expectation of death; the declarations he made concerning his wishes regarding the education of his child in case of his death; the fact—if you find it to be a fact—that on the day preceding his death he was unusually affectionate towards his child; the fact that he left a letter of instructions upon the same subject; the facts concerning his financial condition; the fact that he was under indictment for misdemeanor, and the effect thereof upon his mind and spirit; but the existence of the indictment

and its effect must be considered in the light of the presumption of the law that he was innocent of the charge.

Concerning the letter of instructions written by Louis B. McWhirter in July, 1892, and delivered to Mrs. McWhirter after his death, all the information offered in evidence consists in the statement that it was a letter of instructions as to what was to be done in regard to the education of the child after his death, or in case of his death.

Mrs. McWhirter, when placed upon the witness stand by the defendant, testified that she had received such a letter, and that the same was lost. She was not asked what were the contents of the letter by either party to the suit. You are not to draw any inference against the defendant from the failure of the defendant's counsel to ask for the contents of the letter, or from the failure of the plaintiff's counsel to offer the contents in evidence. You may only draw such inference as you deem reasonable from the fact that such a letter of instructions was written under the circumstances.

Such a letter is in itself proof that McWhirter contemplated death as possible or likely to occur.

It is in itself proof of preparation for death similar in nature and degree to the making of a will or other testamentary expression of the wish of the decedent. Its value as a circumstance in this case depends upon its proximity to the death, and such connection as you may find it to have had with the other evidence which you may think points toward the theory of suicide.

It is for you to say whether it was a paper prepared as a testamentary instrument expressing Mr. McWhirter's general wish concerning the education of his child, in the contingency of his own death, or whether it was inspired by a fear of death from the violence of others, or whether it was prepared in contemplation of suicide, and you are authorized in this connection to consider the fact that Mrs. McWhirter at one time requested her friend Mrs. Lane not to mention the existence of the letter.

On the other hand, you are to take into consideration the evidence touching the physical condition of Louis B. McWhirter, his health, his temperament, his spirits, his ambition, his social and family relations. You are also to bear in mind the evidence concerning the tracks found in the alley by the witness Babcock and others; the evidence concerning the number of shots fired at the time of the death.

If you find from the evidence that any person other than Louis B. McWhirter was present and participating in the shooting, or was present and participating in any way in the transaction, or if you find that more than six shots were fired upon that occasion, at that time and place, then in either such case I instruct you that the evidence is insufficient to support the defense of suicide.

There is testimony from several witnesses that a groan, as of one in pain, was heard just prior to the last three shots. If you believe from the evidence that the groan was the groan of Louis B. McWhirter, and was caused by the shot, or pain of the shot which caused his death and if you also believe from the evidence that subse-

quent to the shot which caused his death three shots were fired at that time and place, then I instruct you that the other evidence is insufficient to support the defense of suicide.

There is evidence that Louis B. McWhirter had two pistols. It is based wholly upon the testimony of Mrs. McWhirter. Her testimony taken upon the Heath trial has been read before you, and you will remember its purport. She testified to another pistol besides the one taken by Mr. McWhirter from the house on the morning of his death, but she says one of these pistols had been presented by McWhirter to her brother.

There are several instructions counsel have asked, some of which I will give you.

You are the sole judges of the effect and value of evidence, except where the same is declared to be conclusive; and that you are the judges of the credibility of the witnesses.

That your power of judging of the effect of evidence is not arbitrary, but has to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

It is the law that a witness false in one part of his testimony is to be distrusted in others.

The evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict.

If weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered is to be viewed with distrust.

The question as to whether or not Louis B. McWhirter did or did not commit suicide is a question of fact, and that you are to determine from the evidence given in this case, and by no other means.

If you believe from the evidence that the said Louis B. McWhirter did commit suicide, then it is your duty under your oaths to find a verdict for the defendant, and in arriving at that conclusion, you are to consider all of the circumstances surrounding the said McWhirter at the time of his alleged death, and take into consideration whether they were such as would or would not induce a man of ordinary intelligence and understanding to take his own life.

In weighing the evidence given by the witnesses upon the stand, you should take into consideration their interest in the subject matter of the controversy; whether they have any interest in the result of your verdict, whether they are related to any parties in the action, and whether it would or it would not be to their benefit if your verdict should be one way or the other.

You are instructed that the real issue in this case, and the one upon which the burden of proof lies upon, the defendant, the insurance company, is whether Louis B. McWhirter killed himself, and not whether any other particular person killed him. If any other person than himself killed McWhirter, the plaintiff is entitled to recover.

The presumption of law is, that Louis B. McWhirter, the decedent, did not kill himself, and the plaintiff is entitled to the benefit of that presumption until the same has been overcome and rebutted by satisfactory evidence.

You are instructed that if Louis B. McWhirter was killed by an accidental discharge of either of the pistols found near his body, at or after his death, the plaintiff is entitled to recover.

You are hereby instructed that the testimony of witnesses apparently inconsistent is always to be so construed, if possible, as to exempt them from the imputation of perjury. Affirmative testimony is from its nature generally of greater weight and better entitled to weight, than negative, and the want of means and opportunity of the witness of knowing the matters in controversy, his actual inattention, the absence of circumstances likely to excite his attention, or the existence of circumstances likely to divert it, are considerations which greatly diminish the effect of negative testimony.

You are further instructed that the evidence of persons who have testified that they heard six shots, but who decline to testify or affirm upon oath that no greater number than six shots were fired is not of equal weight, and should not receive as great an amount of credit at your hands as the testimony of persons of equal credibility and fairness who swear distinctly and positively that they heard seven shots fired, and counted them at the time of the firing, or of persons who heard seven shots fired and united in counting their number with persons at the time engaged in counting the same.

You are further instructed that the entire theory of defense in this case is based upon the assumption that Louis B. McWhirter prepared the clubs and the mask found upon his premises shortly after the killing; that six and only six shots were fired on that occasion; that five and only five were fired onto the fences and outhouses upon the premises; and that McWhirter fired the sixth into his own body and through his own heart, which caused his death. This theory of defense is founded upon the allegation that McWhirter prepared the surroundings to indicate a sham assassination or scene of murder, and then killed himself. If you should find that Louis B. McWhirter did not make such preparations; that he did not saw the club found upon his premises; that he did not prepare the mask; that he did not own or possess both pistols; and that he did not fire all the shots, the bullet holes of which are found in the fence and outhouses and on his own body; your verdict should be for the plaintiff.

You are further instructed that you are at liberty to consider under the law your own experience and observation as to what would be the effect of the discharge of a revolver such as either of the pistols offered in evidence in this case when held by a person and discharged against his own body, in regard to the burning of clothing, powder marks, and the blowing out or ripping of flesh by the explosive force of the gunpowder.

You are to take that in connection with all of the testimony upon the effect of the shooting, and the experiments you saw made, and gain such light as you can from all the circumstances in regard to the pow-

der marks on the garments, if you find there are any such—such light as you think you can obtain from that source.

You are hereby further instructed that evidence is not sufficient to maintain the issue of suicide on behalf of the defendant which does not clearly preponderate upon the defendant's side of that issue. That it is not sufficient to maintain the burden of proof on the part of the defendant, to produce evidence which is equally consistent with the theory or fact of suicide or murder. Evidence is not sufficient to sustain the burden of proof or maintain the affirmative of an issue from which it appears that a man may or may not have committed suicide with equal plausibility or consistency. The evidence must distinctly and clearly preponderate in favor of suicide and not of murder.

You are instructed that by satisfactory evidence, sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.

You are instructed that the evidence of the men of science called by the plaintiff is to the effect that there is no evidence of burning or charring of the fabric of the garments worn by McWhirter at the time he received his death wound, nor any presence of powder or

particles thereof in or upon his said garments. In this state of the evidence, you are at liberty to rely upon the evidence of such experts, coupled with the results of your own experience and observation.

You are instructed that the evidence of men of science called by the plaintiff is to be taken into consideration, remembering, however, that you are not bound by the statements of men of science in cases of this kind. I think the law on that subject is expressed in some instructions which I will read to you.

You are further instructed that certain portions of the testimony given in this case was the opinion of experts in relation to the stains upon the garments introduced in evidence. I instruct you that expert testimony should be received and acted upon with great caution, for the reason that it is simply the opinion of the witness under oath, and not the statement of a fact.

The testimony of an expert is simply an expression, under oath, of the opinion which he entertains, and the jury are not bound by it any further than it coincides with their own opinions based on their examination of the articles, or on such credit as they may give to it on account of the experience of the expert.

Something has been said in the argument in regard to the Heath case. You are to try this case regardless of any other case. The Heath case has nothing to do with your verdict. Your verdict has no effect on the trial of the Heath case. He is not a party to this proceeding. He has not had a hearing in this case, and the proceedings against him had nothing to do with your deliberations.

Mr. Thornton—Plaintiff excepts to the general charge of the Court on the ground that the law, as given by the Court, in regard to the fifteenth question set forth in the application, and the plaintiff's answer is erroneous in this: that the question asks for the opinion of the insured, upon which a charge of fraud or murder concealment cannot be predicated; that the question is too general, and therefore incapable of an answer; that a complete biography would not satisfy the question, and no man ever could be insured who would answer that question inaccurately. The plaintiff likewise excepts to the instruction of your Honor upon that same subject. The instruction is not clearly limited to apprehensions based upon knowledge or threats made prior to the execution of the application for the policy in controversy. I ask your Honor to instruct the jury that the knowledge of these threats and apprehensions must have existed respectively prior to the 18th day of November, 1891, and on the 7th day of March, 1892. I ask that that qualification be expressly given.

The Court—I meant to tell you, gentlemen, that these threats must have existed prior to the time of entering into the contract of insurance. You are to find whether or not they did, from what he said afterwards. That is the only light you have upon the subject. It does not necessarily follow that because he said he had taken out the amount of insurance that he had, or was carrying so large an amount on account of threats of personal violence, that those threats had existed when this particular policy was taken out. He might have heard threats after those

policies were taken out, and increased his amount of insurance on account of threats. You are to take all he said on that subject into consideration, and find whether or not his statement in regard to the threats, and the reason for taking out the policies, applied to this policy, as well as the others. You will take that instruction in connection with the other instructions which I gave you on the same subject.

Mr. Campbell—The defendant desires formally to except to your Honor's instruction in relation to the evidence being insufficient, where the same appears, to sustain our contention of suicide. We further take exception to the last instruction just given, on the ground that all the evidence goes to show that the deceased, Louis B. McWhirter, said that all of his insurance was taken out for the express purpose and with the express idea that he was in danger of his life, and he went further, and stated in the face of the application, that each and every one of the insurance companies knew of the risk that they were taking.

Mr. Thornton—Shall we take our exceptions to specific instructions.

The Court—No, you may state your exceptions afterwards. Gentlemen, endeavor to harmonize your views on this subject, and render a verdict. There are only two verdicts you can render. You may render a verdict for the plaintiff for the full amount sued for; you cannot render a verdict for less than the amount sued for, unless you render a verdict for the defendant. If you render a verdict for the defendant, I suggest that you state on which of the defenses you find it, if you do find for the defendant.

Mr. Campbell—May we be allowed an exception to that?

The Court—Yes.

Mr. Thornton—Will your Honor instruct the jury that there is no question about amount; that we are entitled to fifteen thousand dollars, and seven per cent. interest? It is not named in the complaint, and must be stated specifically.

The Court—I have inserted in one form of verdict the amount that you claim.

Be it further remembered, that the defendant also requested the Court to give the following instructions to the jury:

Gentlemen of the Jury, the issues made by the pleadings in this case are as follows:

1. Did Louis B. McWhirter, on the 28th day of August, 1892, commit suicide, or die by his own hand?

2. Was Louis B. McWhirter, on said date assassinated?

3. Was there a breach of warranty of the contract of insurance entered into between said Louis B. McWhirter and the defendant, the Connecticut Mutual Life Insurance Company?

4. Was Louis B. McWhirter guilty of fraud in concealing certain material facts from said insurance company which were material to said contract—that is, which would have increased the hazard of said insurance, or the premium to be paid by said Louis B. McWhirter.

Which said instruction numbered (—), the Court refused to give, to which the defendant duly excepted.

IX.

In instructing you that a witness false in one part of his testimony is to be distrusted in others, I call your attention to the testimony of Lee Blasingame, a witness produced on behalf of the plaintiff. If you believe from the evidence that the said Lee Blasingame has testified in any particular to anything which is wilfully false, then I instruct you that the remaining part of his evidence is to be received with distrust.

Which said instruction, numbered IX, the Court refused to give, to which the defendant duly excepted.

X.

A great deal has been said during the trial and in the argument of counsel in relation to a certain letter, which the plaintiff admits having been given her after the death of her husband, and which was written to her by her husband concerning her action after his death. It is for you, gentlemen, in view of all the circumstances surrounding the case, to determine whether or not it was the duty of the plaintiff to have divulged the contents of that letter.

If you believe from the evidence that said letter contained evidence that the deceased, Louis B. McWhirter, committed suicide, and that said evidence was in the possession of the said plaintiff, then I instruct you that it was her duty to have made said fact known to the defendant insurance company, upon an application being made to her for such information, if you believe any such application was so made, and if you believe from the evidence that she did receive such a letter, and that she neither produced said letter

nor testified to its contents when upon the stand, then you are to presume for the purposes of this case that if such letter was produced, it would be evidence against the plaintiff in said case, for the law presumes that evidence, wilfully suppressed, would be adverse if it were produced, and that higher evidence would be adverse from inferior being produced, and I instruct you that the letter itself would be the best evidence of its contents.

Which said instruction, numbered X, the Court refused to give, to which the defendant duly excepted.

XI.

In the applications which have been introduced in evidence, the following questions were asked of the deceased, and the following answers given by the deceased:

“Is there any *fact* relating to your physical condition, *personal*, or family history or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?” The answer to that question was “No.”

And, furthermore, it was by the terms of said policies and applications agreed that the questions and answers were a warranty, and that each and every answer to each and every question was true.

If you believe from the evidence in this case that at the time of the application for insurance made by said Louis B. McWhirter, and at the time of the delivery of the policies of insurance, which are the subject matter of this controversy, said Louis B. McWhirter had been threatened, or was apprehensive of being

assassinated, then I instruct you that such facts were a part of the personal history of said Louis B. McWhirter, and should have been communicated to the defendant insurance company, and the failure to so communicate them voids the policy, and you should find a verdict for the defendant.

(By the Court—Given elsewhere.)

Which said instruction the Court refused to give, to which the defendant duly excepted.

“XII.

“The question and answer referred to in the instruction numbered XI were a warranty upon the part of the said Louis B. McWhirter that there was no fact in his personal history that would increase the hazard or increase the premium of said insurance, and you are instructed that the only question for you to determine is as to whether or not said warranty was true. It makes no difference whether said representation was material or not; if you find from the evidence that the same was untrue, then it is your duty to find a verdict for the defendant.”

(By the Court—Denied.)

Which said instruction, numbered XII, the Court refused to give, to which the defendant duly excepted.

“XIII.

“Warranties are a part of the contract of insurance upon which the insurer as well as the insured has a right to rely, and if you find from the evidence that the deceased, Louis B. McWhirter, in answer to the question asked him as to whether or not there was any fact in his personal history which

said company ought to know, said "No," then I instruct you that if it were a fact, and if you so find from the evidence that prior to the time of said application and said answer, the said Louis B. McWhirter had had difficulties with certain persons who threatened his life, and that he was then apprehensive of assassination, that was such a fact as he should have communicated to said company, and his failure to communicate such fact to the said company was a breach of the warranty contained in said application, and you should find a verdict for the defendant."

(By the Court—Denied.)

Which instruction, numbered XIII, the Court refused to give, to which the defendant duly excepted.

"XIV.

"If you find from the evidence that the defendant, Louis B. McWhirter, prior to the application for insurance in these cases, to-wit: December.....1891, and March.....1892, had had difficulties, political and personal, and his life had been threatened, and that he was then apprehensive of being assassinated, and that he concealed said fact in said application from said defendant insurance company, then I instruct you that said Louis B. McWhirter was guilty of fraud in concealing said facts from said company, and it is your duty to find a verdict for the defendant.

(By the Court—Given elsewhere.)

Which said instruction, numbered XVI, the Court refused to give, to which the defendant duly excepted.

"XV.

"A neglect to communicate that which a party knows and ought to communicate is called a concealment. A concealment, whether intentional or unintentional, vitiates the policy, and if you find from the evidence in this case that Louis B. McWhirter's life had been threatened, and that at the time of the applications for said insurance, or the deliverance of the policies of insurance, he concealed said fact from the defendant insurance company, then it is your duty to find a verdict for the defendant."

(By the Court—Given elsewhere.)

Which said instruction, numbered XV, the Court refused to give, to which the defendant duly excepted.

"XVI.

"The materiality of the concealment is to be determined not by the event, but by the probable and reasonable influence upon the party to whom the communication is due in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries; and if you believe from the evidence in this case that the concealment—if you find that there was any—practiced by the said Louis B. McWhirter in obtaining the insurance from the defendant would have had any influence upon the defendant in issuing to him its policies, then I instruct it is your duty to find a verdict for the defendant."

(By the Court—Given already.)

Which instruction, numbered XVI, the Court refused to give, to which the defendant duly excepted.

Whereupon the jury, having retired, subsequently and on the 8th day of February, A. D. 1894, returned the following verdict on the issues submitted to them:

“We, the jury, find for the plaintiff in the sum of \$16,137.50.

J. J. VASCONCELLOS,
Foreman.”

Be it remembered, that thereafter, and to-wit: on the 17th day of February, A. D. 1894, the defendant in the above-entitled action duly served and filed the following notice of motion for new trial:

To the plaintiff above-named, and to Messrs. Thornton & Merzbach, and Thompson & King, her attorneys:

You will please take notice, that the defendant above-named intends to move the Court to set aside and vacate the verdict of the jury, and grant a new trial herein upon the following grounds:

I.

Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

II.

Misconduct of the jury.

III.

Newly-discovered evidence material for the defendant, which it could not, without reasonable diligence, have discovered and produced at the trial.

IV.

Insufficiency of the evidence to justify the verdict.

V.

That the verdict is against law.

VI.

Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon a bill of exceptions to be hereafter prepared and settled, upon affidavits and upon the minutes of the Court.

And you are further notified, that said motion will be made on the 26th day of February, 1894, at the opening of Court on that day, or as soon thereafter as counsel can be heard, or if the bill of exceptions is not settled on said day, said defendant will apply to the Court to continue said motion until said bill of exceptions be settled, and if said motion cannot be heard on the 26th day of February, 1894, said motion will be made on the next succeeding motion day at which it can be heard and notice thereof will be given.

The defendant makes the following assignment of errors as having been committed during the trial of said cause, which were duly excepted to by the defendant at the time:

I.

The Court erred in excluding the deed from Miss N. S. Blasingame to J. A. Lane, and in not allowing the same to be given in evidence.

II.

The Court erred in allowing the witness, Dr. Pedlar, to answer the following question:

“Q. What would have been your estimate or opinion of his personal strength.”

III.

The Court erred in overruling defendant's objection to the question asked the witness Babcock:

"Q. Did he inspect the seventh bullet hole concerning which you have testified through the gunny-sack."

IV.

And also the question asked the same witness: "Were you acquainted with Bury."

V.

The Court erred in overruling defendant's motion to strike out the evidence of the witness Babcock in relation to the hole in the gunnysack having the appearance of a bullet hole.

VI.

The Court erred in sustaining plaintiff's objection to the question asked the witness, Thomas Rhodes, as follows: "Did you hear George Rupert at the time that one of those pistols was picked up state that it was the pistol of Louis B. McWhirter?"

VII.

The Court erred in sustaining plaintiff's objection to the question asked the witness, Mrs. J. A. Lane: "What, if anything, did she say to you about his being affectionate, particularly on that day?"

VIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Mrs. W.

D. Crichton: "What, if anything, did she tell you at that time and place in relation to what she had seen?"

IX.

The Court erred in sustaining plaintiff's objections to the following question asked the witness, H. H. Welch: "Please state to the jury what it was she stated she saw at that time and in the same presence?"

X.

The Court erred in sustaining plaintiff's objection to the following question asked the same witness: "Did she at the time and at the place mentioned and in the presence of the persons stated, tell you that she had looked out of the window, and at the last shot had seen Mr. McWhirter fall?"

XI.

The Court erred in sustaining plaintiff's objection to the following question asked the same witness: "Did she at that time and in the presence of the Sheriff of the county, and Thomas Bury and Mrs. McWhirter, state to you that she had looked out of the window, and that she saw something white fall, and heard nobody run away and no noises?"

XII.

The Court erred in overruling defendant's objection to the following question asked the witness, Thomas Bury: "You were in constant consultation with the attorneys for the defendant?" (referring to the Heath case during the trial).

XIII.

The Court erred in overruling defendant's objection to the following question asked the witness, G. H. Bernard: "What was said—by whom and to whom?"

XIV.

And in overruling defendant's objection to the following question asked the same witness: "What, if anything, did Philip Scott, at that time and place, say about sawdust?"

XV.

The Court erred in sustaining plaintiff's objection to the following documents produced by the witness, Seaver:

"San Francisco, September 1st, 1892.

"To Colt's Fire Arms Company,

"Hartford, Conn.

"When and to whom did you invoice forty-one double-action revolver, No. 88,031? Answer by telegram immediately."

"Colt Patent Firearms Company.'

"Hartford, Conn.

"To Colt's Arms Co.,

"San Francisco, Cal.

"88,030 sent you May 5th, 1892.

"Colt Arms Co."

XVI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, W. A. Seaver: "Can you state to this jury whether or not in the month of May, at any time, you received an invoice of

pistols similar in kind and character to that which you now hold in your hand, and if so, how many?"

XVII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, W. A. Seaver: "Now, then, I will ask you whether or not on the 7th day of June, if you can tell, you sold and delivered a pistol exactly similar in kind and character to the firm of Clabrough, Golcher & Co., in the City and County of San Francisco, who have their present business in the Grand Hotel Building, between New Montgomery and Second streets—that is, within 500 feet of the Palace Hotel."

XVIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, E. F. Bernhard, "Did you have any conversation with Mr. McWhirter in returning from that banquet in relation to suicide, or anything of that kind."

XIX.

The Court erred in refusing to permit the following question asked by counsel for defendant, to be answered by the witness, D. L. Davis: "I will ask you whether or not in that saw at that time there was a tooth that fitted into the cuts or curves of this osage orange."

XX.

The Court erred in not permitting the counsel for defendant to ask the following question of the same witness: "Whether or not at the time when you were called in by the District Attorney of the county he

made an examination of the saw and fitted the teeth into these cuts or curves of this osage orange where it had been sawed."

XXI.

The Court erred in refusing to allow defendant to prove by the witness, D. L. Davis, the manner in which he fitted it and the result.

XXII.

The Court erred in sustaining defendant's objection to defendant's offer to prove by the witness Golcher, of the firm of Clabrough, Golcher & Co., that the pistol was received by them on the 7th of June, from the agent of the Colt's factory, and sold on that day.

XXIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, E. F. Bernhard: "I will ask you whether or not in the spring of 1889, you had a conversation with the deceased, L. B. McWhirter, in relation to suicide, and if so, what that conversation was."

XXIV.

The Court erred in excluding the following testimony of the witness, E. F. Bernhard:

Mr. Campbell—Q. Can you now fix the date of your conversation with Mr. McWhirter as near as possible?

A. I think it was in the spring of 1889.

Q. The spring of 1889? A. I think so.

Q. Now will you please state what, if anything, Mr. McWhirter said to you in relation to suicide or in re-

lation to under what circumstances he would commit suicide?

A. The exact conversation I could not state at this time, but to the best of my recollection it was this, that if he ever did anything that would disgrace himself or his family, that he would kill himself, or that he would kill himself if he ever did anything that would bring disgrace upon him or his family.

Q. Is that the substance of the testimony?

A. That is the substance.

Q. Where had you been that evening, if you remember?

A. We had been to a little entertainment at Mr. Grady's residence.

Q. You were coming home together, were you?

A. We were coming together. We left together—we walked from Mr. Grady's residence to this point.

Q. That was the substance of what he told you?

A. Yes sir.

The Court—You might state in what connection this conversation arose.

A. We were discussing, to the best of my recollection, some of the history, you might term it, of another person, and in that connection this conversation arose out of that.

The Court—That is all. I think the ruling is correct.

Mr. Campbell—I was going to make the following offer: To re-offer this testimony in connection with the testimony that was offered this morning, of Mr. Chapman with the record.

Objection sustained and defendant excepts.

XXV.

The Court erred in refusing to allow defendant to re-offer the testimony of E. F. Bernhard in connection with the testimony of the witness Chapman, and the record.

XXVI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Richard S. Heath: "State to the jury whether or not you killed Louis B. McWhirter."

XXVII.

The Court erred in refusing to allow counsel for defendant to ask the same question of Judge Harris, Superior Judge of Fresno County.

XXVIII.

The Court erred in refusing to allow counsel for defendant to ask the same question of Reel B. Terry.

XXIX.

The Court erred in refusing to allow counsel for defendant to ask the same question of Mr. Grady, the attorney.

XXX.

The Court erred in refusing to allow counsel for defendant to ask the same question to Senator Goucher.

XXXI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Richard S. Heath: "Is your trial still pending?"

XXXII.

The Court erred in granting plaintiff's motion to strike out the following answer of the witness, O. N. Chaffee: Mrs. McWhirter, I think, on the 18th of October, the same day, stated that they had detectives out at work, trying to find out who murdered Mr. McWhirter; that they had facts in their possession; that they had traced out a great many reports which had been made alleging that this was a suicide, and that in every case they had traced them home to parties who were raising the suicide theory.

XXXIV.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, O. M. Chaffee: "Did Mrs. McWhirter at that time say anything to you about having received a letter of instructions or received instructions from her husband as to what to do in case of his death."

XXXV.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "I wanted to ask her whether anything was said between herself and her husband."

XXXVI.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "How often, Mrs. McWhirter, did you and Mr. McWhirter discuss and talk over the subject of training and education of your child."

XXXVII.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "About how often."

XXXIX.

The Court erred in overruling defendant's motion to strike out the following answer of the witness, John S. Eastwood: "It seems to me that I heard a groaning sound."

XL.

The Court erred in denying defendant's motion to strike out the following answer of the witness, W. L. Raims: "It is my opinion that the first two shots could not have been fired out of the same pistol."

XLI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Hume: "Do you know on what Mr. Thacker's opinion as to the suicide is based?"

XLII.

The Court erred in overruling defendant's objection to the following question asked the witness, J. E. Baker: "What was his general conduct and exhibition of sentiment towards his child?"

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XLIV.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Dr. Dardorff: "Did you not testify upon that coroner's inquest that you examined Mr. McWhirter upon March 18th for the New York Life Insurance Company, and on March 23rd for the Providence Life Insurance Company, and he stated to you at that time: "I have a good many political enemies and I expect really that my life will be attempted or that I will be killed before the campaign closes."

XLV.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, J. E. Baker: "Did he not tell you that he was apprehensive of being assassinated, and for that reason he carried \$60,000 in life insurance."

XLVI.

The Court erred in overruling defendant's objection to the following question asked the witness, Dr. E. G. Webb: "In the first instance in which the clothing was set on fire, what was the nature of the garment, and under what circumstances—was the——"

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nin: "Was there anything unusual or different from the ordinary or usual talk of Mr. Louis B. McWhirter on the 28th of August."

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The Court erred in overruling defendant's objection to the following question asked the witness, Lee Blas- ingame: "When and from what person was the first time you ever knew or heard of sawing by any person of that branch or bough of osage orange, in the vacant lot adjoining Mrs. Southwood's house?"

LII.

The Court erred in overruling defendant's objection to the following question asked the witness, John L. Meares: "Did you see any affray or assault between McWhirter and Carroll?"

LIII.

The Court erred in overruling defendant's objection to the answer of the witness: "I turned to McWhir- ter, and asked him if he had a pistol."

LIV.

The Court erred in charging the jury in relation to the sufficiency and insufficiency of the evidence to sustain the defense of suicide, and the defendant specifies the particular portions of the charge so erroneous, as fol- lows:

“If you find from the evidence that any other person than Louis B. McWhirter was present and participating in the shooting, or was present and participating in any way in the transaction, or if you find that more than six shots were fired upon that occasion at that time and place, then in either such case I instruct you that the evidence is insufficient to support the defense of suicide.

“You are further instructed that the entire theory of the defense in this case is based upon the assumption that Louis B. McWhirter prepared the clubs and the mask found on his premises shortly after the killing; that six and only six shots were fired on that occasion; that five and only five were fired into the fences and outhouses upon the premises, and that McWhirter fired the sixth into his own body and through his own heart, which caused his death. This theory of the defense is founded upon the allegation that McWhirter prepared the surroundings to indicate a sham assassination or scene of murder and then killed himself. If you should find that Louis B. McWhirter did not make such preparations, that he did not see the club found upon his premises, that he did not prepare the mask, that he did not own or possess both pistols, and that he did not fire all the shots, the bullet holes of which are found in the fences and outhouses and on his own body, your verdict should be for the plaintiff.

LV.

The Court erred in charging the jury in relation to the defense of fraudulent concealment, and the defendant specifies the particular portion of the charge so erroneous, as follows:

I meant to tell you, gentlemen, that these threats must have existed prior to the time of entering into the contract of insurance. You are to find whether or not they did, from what he said afterwards. That is the only light you have upon the subject. It does not necessarily follow that because he said he had taken out the amount of insurance that he had, or was carrying so large an amount on account of threats of personal violence, that these threats had existed when this particular policy was taken out. He might have heard threats after those policies were taken out, and increased his amount of insurance on account of threats. You are to take all he said on that subject into consideration, and find whether or not his statement in regard to the threats, and the reason for taking the policies, applied to this policy as well as the others. You will take that instruction in connection with the other instructions which I give you on the same subject.

LVI.

The Court erred in charging the jury in relation to the amount of the verdict, and the defendant specifies the particular portions of the charge so erroneous as follows:

“Gentlemen, endeavor to harmonize your views on this subject, and render a verdict. There are only two verdicts that you can render. You may render a verdict for the plaintiff for the full amount sued for; you cannot render a verdict for less than the amount sued for, unless you render a verdict for the defendant. If you render a verdict for the defendant, I suggest that you state on which of the two defenses you find it, if you do find for the defendant.”

LVII.

The Court erred in refusing to give the instruction numbered "O" requested by the plaintiff.

LVIII.

The Court erred in refusing to give the instruction numbered IX, requested by the plaintiff.

LIX.

The Court refused to give the instruction numbered X, requested by the plaintiff.

LX.

The Court erred in refusing to give the instruction numbered XI, requested by the plaintiff.

LXI.

The Court erred in refusing to give the instruction numbered XII, requested by the plaintiff.

LXII.

The Court erred in refusing to give the instruction numbered XIII, requested by the plaintiff.

LXIII.

The Court erred in refusing to give the instruction numbered XIV, requested by the plaintiff.

LXIV.

The Court erred in refusing to give the instruction numbered XV, requested by the plaintiff.

LXV.

The Court erred in refusing to give the instruction numbered XVI, requested by the plaintiff.

The defendant hereby specifies the following particulars wherein the evidence is insufficient to justify the verdict.

I.

That all of the evidence given upon the subject, without any contradiction whatever, shows that the deceased, Louis B. McWhirter, at the time of making application for the insurance—the subject matter of this action—had been threatened with assassination, and expected to be killed or assassinated, and that he concealed said facts from the defendant here; and that said concealment thereby became and was a breach of the warranty in the application for insurance made and signed by said Louis B. McWhirter, and was and is a fraudulent concealment under and by virtue of the statute of California.

In commemoration of all of which this..... day of.....1892, and within the time allowed by law and the order of this Court, the defendant presents this, its bill of exceptions, and prays that the same may be settled and allowed as correct and signed by the Judge of said Court.

JAMES H. BUDD,
REDDY, CAMPBELL & METSON,
Attorneys for Defendant.

The foregoing bill of exceptions is correct, and as such is settled and allowed.

W. B. GILBERT,
Judge.

Dated May 23, 1894.

Due service of within is admitted this 5th day of April, 1894.

THORNTON & MERZBACH,
Attorneys for Plff.

[Endorsed]: Filed April 5th, 1894. W. J. Costigan, Clerk. Re-filed after settlement as Bill of Exceptions, May 23, 1894. W. J. Costigan, Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

NANNIE S. McWHIRTER,	}
Plaintiff,	
vs.	}
THE CONNECTICUT MUTUAL LIFE	
INSURANCE COMPANY,	
Defendant.	}

At Law. Petition for Writ of Error.

The defendant, Connecticut Mutual Life Insurance Company, feeling itself aggrieved by the judgment made and entered by said Court on the 9th day of February, 1894, against defendant and in favor of plaintiff, now comes the said defendant, by its attorneys, James H. Budd and J. C. Campbell, and petitions said Court for an order allowing this defendant a writ of errors from the judgment herein, to the Honorable Court of the United States, Circuit Court of Appeals, for the Ninth Circuit, sitting at the City of San Francisco, State of California, and according to the laws of the United States in that behalf made and

provided, and also that an order be made fixing the security which defendant shall furnish upon said writ of error.

And your petitioner will ever pray, etc.

JAMES H. BUDD AND
J. C. CAMPBELL,
Attorneys for Defendant.

[Endorsed]: Filed August 7, 1894. W. J. Costigan, Clerk. By W. S. Beaizley, Deputy Clerk. James H. Budd and J. C. Campbell, Attorneys.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

NANNIE S. McWHIRTER,)
Plaintiff,)
vs.)
CONNECTICUT MUTUAL LIFE INSUR-)
ANCE COMPANY,)
Defendant.)

At Law. Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which, it avers, occurred upon the trial of the cause, to-wit:

I.

The Court erred in excluding the deed from Miss N. S. Blasingame to J. A. Lane, and in not allowing the same to be given in evidence.

II.

The Court erred in allowing the witness, Dr. Pedlar, to answer the following question:

“Q. What would have been your estimate or opinion of his personal strength?”

III.

The Court erred in overruling defendant’s objection to the question asked the witness Babcock:

“Q. Did he inspect the seventh bullet hole, concerning which you have testified, through the gunny-sack ?”

IV.

And also the question asked the same witness: “Were you acquainted with Bury?”

V.

The Court erred in overruling defendant’s motion to strike out the evidence of the witness, Babcock, in relation to the hole in the gunnysack having the appearance of a bullet hole.

VI.

The Court erred in sustaining plaintiff’s objection to the question asked the witness, Thomas Rhodes, as follows: “Did you hear George Rupert at the time that one of those pistols was picked up state that it was the pistol of Louis B. McWhirter?”

VII.

The Court erred in sustaining plaintiff’s objection to the question asked the witness, Mrs. J. A. Lane: “What, if anything, did she say to you about his being affectionate, particularly on that day?”

VIII.

The Court erred in sustaining plaintiff’s objection to the following question asked the witness, Mrs. W. D.

Crichton: "What, if anything, did she tell you at that time and place in relation to what she had seen?"

IX.

The Court erred in sustaining plaintiff's objections to the following question asked the witness, H. H. Welch: "Please state to the jury what it was she stated she saw at the time and in the same presence?"

X.

The Court erred in sustaining plaintiff's objection to the following question asked the same witness: "Did she at the time and at the place mentioned and in the presence of the persons stated, tell you that she had looked out of the window and at the last shot had seen Mr. McWhirter fall?"

XI.

The Court erred in sustaining plaintiff's objection to the following question asked the same witness: "Did she at that time, and in the presence of the sheriff of the county and Thomas Bury and Mrs. McWhirter, state to you that she had looked out of the window and that she saw something white fall, and heard nobody run away and no noises?"

XII.

The Court erred in overruling defendant's objection to the following question asked the witness, Thomas Bury: "You were in constant consultation with the attorneys for the defendant?" (referring to the Heath case during the trial.)

XIII.

The Court erred in overruling defendant's objection to the following question asked the witness G. H. Bernard: "What was said—by whom and to whom?"

XIV.

And in overruling the defendant's objection to the following question asked the same witness: "What, if anything, did Phillip Scott at that time and place say about sawdust?"

XV.

The Court erred in sustaining plaintiff's objection to the following documents procured by the witness Seaver:

"San Francisco, September 1st, 1892.

"To Colt's Patent Firearms Company, Hartford, Conn.

"When and to whom did you invoice forty-one double-action revolver No. 88,031. Answer by telegram immediately.

"Colt's Patent Firearms Company."

"Hartford, Conn.

"To Colt's Arms Co., San Francisco, Cal.

"88,030 sent you May 5th, 1892.

"Colt Arms Co."

XVI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness W. A. Seaver: "Can you state to this jury whether or not, in the month of May, at any time, you received an invoice of pistols similar in kind and character to that which you now hold in your hand, and if so, how many?"

XVII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, W. A. Seaver: "Now, then, I will ask you whether or not on the 7th day of June, if you can tell, you sold and delivered a pistol exactly similar in kind and character to the firm of Clabrough, Golcher & Co., in the City and County of San Francisco, who have their present business in the Grand Hotel Building, between Montgomery and Second streets—that is, within 500 feet of the Palace Hotel?"

XVIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, E. F. Bernard: "Did you have any conversation with Mr. McWhirter in returning from that banquet in relation to suicide, or anything of that kind?"

XIX.

The Court erred in refusing to permit the following question asked by counsel for defendant, to be answered by the witness, D. L. Davis: "I will ask you whether or not in that saw at that time there was a tooth that fitted into the cuts or curves of this osage orange?"

XX.

The Court erred in not permitting the counsel for defendant to ask the following question to the same witness: "Whether or not at the time when you were called in by District-Attorney of the county he made an examination of the saw and fitted the teeth into these cuts or curves of this osage orange where it had been sawed?"

XXI.

The Court erred in refusing to allow defendant to prove by the witness, D. L. Davis, the manner in which he fitted it and the result.

XXII.

The Court erred in sustaining defendant's objections to defendant's offer to prove by the witness Golcher, of the firm of Clabrough, Golcher & Co., that the pistol was received by them on the 7th of June from the agent of the Colt's factory, and sold on that day.

XXIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, E. F. Bernhard: "I will ask you whether or not in the spring of 1889, you had a conversation with the deceased, L. B. McWhirter, in relation to suicide, and if so, what that conversation was?"

XXIV.

The Court erred in excluding the following testimony of the witness E. F. Bernhard:

"Mr. Campbell—Q. Can you now fix the date of your conversation with Mr. McWhirter, as near as possible?"

"A. I think it was in the spring of 1889.

"Q. The spring of 1889? A. I think so.

"Q. Now, will you please state, what, if anything, Mr. McWhirter said to you in relation to suicide, or in relation—under what circumstances he would commit suicide?"

“A. The exact conversation I could not state at this time, but to the best of my recollection it was this, that if he ever did anything that would disgrace himself or his family, that he would kill himself, or that he would kill himself if he ever did anything that would bring disgrace upon him or his family.

“Q. Is that the substance of the testimony?

“A. That is the substance.

“Q. Where had you been that evening, if you remember?

“A. We had been to a little entertainment at Mr. Grady’s residence.

“Q. You were coming home together, were you.

“A. We were coming together. We left together—we walked from Mr. Grady’s residence to this point.

“Q. That was the substance of what he told you.

“A. Yes, sir.

“The Court—You might state in what connection this conversation arose.

“A. We were discussing, to the best of my recollection, some of the history, you might term it, of another person, and in that connection this conversation arose out of that.

“The Court—That is all, I think the ruling is correct.

“Mr. Campbell—I was going to make the following offer—to re-offer this testimony in connection with the testimony that was offered this morning, of Mr. Chapman with the record.”

“Objection sustained and defendant excepts.”

XXV.

The Court erred in refusing to allow defendant to re-offer the testimony of E. F. Bernhard in connection with the testimony of the witness Chapman and the record.

XXVI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Richard S. Heath: "State to the jury whether or not you killed Louis B. McWhirter."

XXVII.

The Court erred in refusing to allow counsel for defendant to ask the same question of Judge Harris, Superior Judge of Fresno County.

XXVIII.

The Court erred in refusing to allow counsel for defendant to ask the same question of Reel B. Terry.

XXIX.

The Court erred in refusing to allow counsel for defendant to ask the same question of Mr. Gray, the attorney.

XXX.

The Court erred in refusing to allow counsel for defendant to ask the same question of Senator Goucher.

XXXI.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, Richard S. Heath: "Is your trial still pending?"

XXXII.

The Court erred in granting plaintiff's motion to strike out the following answer of the witness, O. N. Chaffee: "Mrs. McWhirter, I think, on the 18th of October, the same day stated that they had detectives out at work, trying to find out who murdered Mr. McWhirter; that they had facts in their possession; that they had traced out a great many reports which had been made alleging that this was a suicide, and that in every case they had traced them home to parties who were raising the suicide theory?"

XXXIII.

The Court erred in sustaining plaintiff's objection to the following question asked the witness, O. M. Chaffee: "Did Mrs. McWhirter at that time say anything to you about having received a letter of instructions or received instructions from her husband as to what to do in case of his death?"

XXXIV.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "I wanted to ask her whether anything was said between herself and her husband?"

XXXV.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "How often, Mrs. McWhirter, did you and Mr. McWhirter discuss and talk over the subject of training and education of your child?"

XXXVI.

The Court erred in overruling defendant's objection to the following question asked the witness, Mrs. N. S. McWhirter: "About how often?"

XXXVIII.

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XLV.

The Court erred in overruling defendant's objection to the following question asked the witness, Dr. E. C. Webb: "In the first instance in which the clothing was set on fire, what was the nature of the garment, and under what circumstances was the—"

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The Court erred in sustaining plaintiff's objection to the question asked the witness, W. J. Tinnin: "He had told you that before that time, had he not?"

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L.

The Court erred in overruling defendant's objection to the following question asked the witness, John L. Meares: "Did you see any affray or assault between McWhirter and Carroll?"

LI.

The Court erred in overruling defendant's objection to the answer of the witness: "I turned to McWhirter and asked him if he had a pistol."

LII.

The Court erred in charging the jury in relation to the sufficiency of the evidence to sustain the defense

of suicide, and the defendant specifies the particular portions of the charge so erroneous, as follows:

“If you find from the evidence that any other person than Louis B. McWhirter was present and participating in the shooting, or was present and participating in any way in the transaction, or if you find that more than six shots were fired upon that occasion, at that time and place, then in either such case I instruct you that the evidence is insufficient to support the defense of suicide.

“You are further instructed that the entire theory of the defense in this case is based upon the assumption that Louis B. McWhirter prepared the clubs and the mask found upon his premises shortly after the killing; that six, and only six shots, were fired on that occasion; that five, and only five, were fired into the fence and outhouses upon the premises, and that McWhirter fired the sixth into his own body and through his own heart, which caused his death. This theory of the defense is founded upon the allegation that McWhirter prepared the surroundings to indicate a sham assassination or scene of murder and then killed himself. If you should find that Louis B. McWhirter did not make such preparations, that he did not see the club found upon his premises, that he did not prepare the mask, that he did not own or possess both pistols, and that he did not fire all the shots, the bullet holes of which are found in the fences and outhouses and on his own body, your verdict should be for the plaintiff.”

LIII.

The Court erred in charging the jury in relation to the defense of fraudulent concealment, and the

defendant specifies the particular portion of the charge so erroneous, as follows:

“I meant to tell you, gentlemen, that these threats must have existed prior to the time of entering into the contract of insurance. You are to find whether or not they did, from what he said afterwards. That is the only light you have on the subject. It does not necessarily follow that because he said he had [taken out the amount of insurance that he had, or was carrying so large amount on account of threats of personal violence, that those threats had existed when this particular policy was taken out. He might have heard threats after those policies were taken out, and increased his amount of insurance on account of threats. You are to take all he said on that subject into consideration, and find whether or not his statement in regard to the threats, and the reason for taking the policies, applied to this policy as well as the others. You will take the instruction in connection with the other instructions which I give you on the same subject.”

LIV.

The Court erred in charging the jury in relation to the amount of the verdict, and the defendant specifies the particular portions of the charge so erroneous as follows:

“Gentlemen, endeavor to harmonize your views on this subject, and render a verdict. There are only two verdicts that you can render. You may render a verdict for the plaintiff for the full amount sued for; you cannot render a verdict for less than the amount sued for, unless you render a verdict for the

defendant. If you render a verdict for the defendant, I suggest that you state on which of the two defenses you find it, if you do find for the defendant."

LV:

The Court erred in refusing to give the instruction numbered "O" requested by the defendant, which instruction is as follows:

"Gentlemen of the Jury, the issues made by the pleadings in this case are as follows:

1. Did Louis B. McWhirter on the 28th day of August, 1892, commit suicide, or die by his own hand?

2. Was Louis B. McWhirter on said date assassinated?

3. Was there a breach of warranty of the contract of insurance entered into between said Louis B. McWhirter and the defendant, the Connecticut Mutual Life Insurance Company?

4. Was Louis B. McWhirter guilty of fraud in concealing certain material facts from said insurance company which were material to said contract, that is, which would have increased the hazard of said insurance or the premium to be paid by said Louis B. McWhirter."

LVI.

The Court erred in refusing to give the instruction number IX, requested by the defendant, which instruction is as follows:

"In instructing you that a witness false in one part of his testimony is to be distrusted in others, I call your attention to the testimony of Lee

Blasingame, the witness produced on behalf of the plaintiff. If you believe from the evidence that the said Lee Blasingame has testified in any particular to anything which is wilfully false, then I instruct you that the remaining part of his evidence is to be received with distrust."

LVII.

The Court erred in refusing to give the instruction numbered X, requested by the defendant, which instruction is as follows:

"A great deal has been said during the trial and in the argument of counsel in relation to a certain letter which the plaintiff admits having been given her after the death of her husband, and which was written to her by her husband concerning her action after his death. It is for you, gentlemen, in view of all of the circumstances surrounding the case, to determine whether or not it was the duty of the plaintiff to have divulged the contents of that letter.

"If you believe from the evidence that said letter contained evidence that the deceased, Louis B. McWhirter, committed suicide, and that said evidence was in the possession of the said plaintiff, then I instruct you that it was her duty to have made said facts known to the defendant insurance company upon an application being made to her for such information, if you believe any such application was so made, and if you believe from the evidence that she did receive such a letter, and that she neither produced said letter nor testified to its contents when upon the stand, then you are to presume, for the purposes of this

case, that if such letter was produced, it would be evidence against the plaintiff in said cause, for the law presumes that evidence wilfully suppressed would be adverse if it were produced, and that higher evidence would be adverse from inferior being produced, and I instruct you that the letter itself would be the best evidence of its contents."

LVIII.

The Court erred in refusing to give the instruction numbered XI, requested by the defendant, which instruction is as follows:

"In the applications which have been introduced in evidence, the following questions were asked of the deceased, and the following answers given by the deceased:

"Is there any *fact* relating to your physical condition, *personal* or family history or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?" The answer to that question was 'No.'"

And furthermore, it was by the terms of said policies and applications agreed that the questions and answers were a warranty, and that each and every answer to each and every question was true.

If you believe from the evidence in this case that at the time of the application for insurance made by said Louis B. McWhirter, and at the time of the delivery of the policies of insurance which are the subject matter of this controversy, said Louis B. McWhirter had been threatened or was apprehensive of being

assassinated, then I instruct you that such facts were a part of the personal history of said Louis B. McWhirter, and should have been communicated to the defendant insurance company, and the failure to so communicate them avoids the policy, and you should find a verdict for the defendant."

LXIX.

The Court erred in refusing to give the instruction numbered XII, requested by the defendant, which instruction is as follows:

"The question and answer referred to in the instruction numbered IX were a warranty upon the part of the said Louis B. McWhirter that there was no fact in his personal history that would increase the hazard or increase the premium of said insurance, and you are instructed that the only question for you to determine is as to whether or not said warranty was true. It makes no difference whether said representation was material or not, if you find from the evidence that the same was untrue, then it is your duty to find a verdict for the defendant."

LX.

The Court erred in refusing to give the instruction numbered XIII, requested by the defendant, which instruction is as follows:

"Warranties are a part of the contract of insurance upon which the insurer as well as the insured has a right to rely, and if you find from the evidence that the deceased, Louis B. McWhirter, in answer to the question asked him as to whether or not there was any fact in his personal history which said company

ought to know, said "No," then I instruct you that if it were a fact, and if you so find from the evidence, that prior to the time of said application and said answer, the said Louis B. McWhirter had had difficulties with certain persons who threatened his life, and that he was then apprehensive of assassination, that was such a fact as he should have communicated to said company, and his failure to communicate such fact to the said company was a breach of the warranty contained in said application, and you should find a verdict for the defendant."

LXI.

The Court erred in refusing to give the instruction, numbered XIV, requested by the defendant, which instruction is as follows:

"If you find from the evidence that the deceased, Louis B. McWhirter, prior to the application for insurance in these cases, to-wit: December, 1891, and March, 1892, had had difficulties, political and personal, and his life had been threatened, and that he was then apprehensive of being assassinated, and that he concealed said fact in said application from said defendant insurance company, then I instruct you that said Louis B. McWhirter was guilty of fraud in concealing said facts from said company, and it is your duty to find a verdict for the defendant."

LXII.

The Court erred in refusing to give the instruction, numbered XV, requested by the defendant, which instruction is as follows:

“A neglect to communicate that which a party knows and ought to communicate is called a concealment. A concealment, whether intentional or unintentional, vitiates the policy, and if you find from the evidence in this case that Louis B. McWhirter’s life had been threatened, and that at the time of the application for said insurance or the deliverance of the policies of insurance, he concealed said fact from the defendant insurance company, then it is your duty to find a verdict for the defendant.”

LXIII.

The Court erred in refusing to give the instruction, numbered XVI, requested by the defendant, which instruction is as follows:

“The materiality of the concealment is to be determined not by the event, but by the probable and reasonable influence upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries, and if you believe from the evidence in this case that the concealment, if you find that there was any, practiced by the said Louis B. McWhirter, in obtaining the insurance from the defendant would have had any influence upon the defendant in issuing to him its policies, then I instruct you it is your duty to find a verdict for the defendant.”

LXIV.

That the judgment is against law.

LXV.

That the judgment is contrary to the evidence.

LXVI.

That the judgment is not supported by the evidence, in this, that all of the evidence given upon the subject, without any contradiction whatever, shows that the deceased, Louis B. McWhirter, at the time of making application for the insurance—the subject matter of this action—had been threatened with assassination, and expected to be killed or assassinated, and that he concealed said facts from the defendant here; and that said concealment thereby became and was a breach of the warranty in the application for insurance made and signed by said Louis B. McWhirter, and was and is a fraudulent concealment under and by virtue of the statute of California.

LXVII.

That the Court erred in overruling the demurrer to the plaintiff's complaint interposed by the Connecticut Mutual Life Insurance Company, defendant.

LXVIII.

That the Court erred in overruling the demurrer interposed by the Connecticut Mutual Life Insurance Company, defendant, to the first count of plaintiff's complaint.

LXIX.

That the Court erred in overruling the demurrer interposed by the Connecticut Mutual Life Insurance Company, defendant, to the second count of the plaintiff's complaint.

LXX.

That the Court erred in entering judgment in favor of the plaintiff against the defendant.

And the defendant, the Connecticut Mutual Life Insurance Company, prays that said judgment be reversed, annulled and altogether for naught held, and that it may be restored to all things which it has lost by occasion of said judgment.

JAMES H. BUDD and J. C. CAMPBELL,
Attorneys for Defendant, Connecticut Mutual
Life Insurance Company.

[Endorsed]: Filed August 7, 1894. J. W. Costigan,
Clerk. By W. B. Beazley, Deputy Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

NANNIE S. McWHIRTER,	}
Plaintiff,	
vs.	}
CONNECTICUT MUTUAL LIFE INSUR-	
ANCE COMPANY,	
Defendant.	}

At Law. Order for Writ of Error.

This seventh day of August, 1894, came the defendant by its attorneys, James H. Budd and J. C. Campbell, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error, intended to be urged by said defendant. On consideration whereof, it is ordered that a Writ of Error to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment hereinbefore, on the 9th day of February, 1894, filed and entered herein against defendant, and in favor of plaintiff, be and the same is hereby allowed, and that a certified transcript of the record be forthwith transmitted to said

United States Circuit Court of Appeals, for the Ninth Circuit, upon a bond being given and approved by the undersigned Judge, or in his absence by the Clerk of said Court, conditioned in the sum of five hundred dollars, that the said Connecticut Mutual Life Insurance Company, defendant, shall prosecute its writ to effect, and if it fails to make its plea good, shall answer all costs; and

It is further ordered, that execution of said judgment shall be stayed upon said Connecticut Mutual Life Insurance Company giving a supersedeas bond, conditioned in the sum of thirty-three thousand dollars.

Dated San Francisco, California, August 7th, 1894.

JOSEPH McKENNA,

Circuit Judge.

[Endorsed]: Filed August 7, 1894. W. J. Costigan, Clerk. By W. B. Beazley, Deputy Clerk.

In the Circuit Court of the United States, Northern District of California.

NANNIE S. McWHIRTER,

Plaintiff,

vs.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Defendant.

Stipulation.

It is hereby stipulated that the defendant in the above-entitled action need not give a supersedeas bond

to stay the execution of the judgment therein, from which it is prosecuting a writ of error, until the motion for a new trial is heard and determined.

THORNTON & MERZBACH,
Attorneys for Plaintiff.

[Endorsed]: Filed August 9th, 1894. W. J. Costigan, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

NANNIE S. McWHIRTER,

Plaintiff,

vs.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, the Connecticut Mutual Life Insurance Company, as principal, and F. R. Noyes of the County of Alameda, and C. B. Parcels of the County of Alameda, as sureties, are held and firmly bound unto the above named Nannie S. McWhirter in the sum of five hundred dollars, to be paid to the said Nannie S. McWhirter, her executors, administrators or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of August, 1894.

WHEREAS, The above-named Connecticut Mutual Life Insurance Company has prosecuted a Writ of Error to correct a judgment rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Northern District of California.

Now, THEREFORE, The condition of this obligation is such that if the above-named Connecticut Mutual Life Insurance Company shall prosecute said Writ of Error to effect, if it fails to make its plea good shall answer all costs, then this obligation to be void, otherwise to remain in full force and virtue.

THE CONNECTICUT MUTUAL LIFE INSURANCE
COMPANY,

By F. R. NOYES, Genl. Agent. (Seal)

F. R. NOYES. (Seal)

C. B. PARCELLS. (Seal)

Sealed and delivered and taken and acknowledged before me this 8th day of August, 1894.

W. J. COSTIGAN,

Commissioner and Clerk U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA. } ss.

C. B. Parcells and J. R. Noyes, the sureties whose names are subscribed to the foregoing bond, being severally duly sworn, each for himself, says, I am a resident of the Northern District of California, and am a holder therein, and am worth the sum in foregoing bond specified as the penalty thereof over

and above all my just debts and liabilities, exclusive of property exempt from execution.

C. B. PARCELLS.

F. R. NOYES.

Subscribed and sworn to before me this 8th day of August, 1894.

W. J. COSTIGAN,

Commissioner and Clerk U. S. Circuit Court,
Northern District of California.

The foregoing bond approved this 9th day of August, 1894.

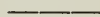
JOSEPH McKENNA.

The foregoing is satisfactory bond.

THORNTON & MERZBACH,

Attorneys for Plaintiff.

[Endorsed]: Filed August 9th, 1894. W. J. Costigan, Clerk.



*In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.*

NANNIE S. McWHIRTER,

Plaintiff,

vs.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

Defendant.

Certificate of Transcript.

I, W. J. Costigan, Clerk of the Circuit Court of the United States of America, Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing (349) written pages, numbered from 1 to 349 inclusive, to be a full, true and correct

copy of the record, papers and proceedings in the above and therein entitled cause, and that the same constitute the return to the annexed Writ of Error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 31st day of August, A. D. 1894.

W. J. COSTIGAN,

Clerk of the U. S. Circuit Court, Northern District of California.

THE UNITED STATES OF AMERICA.—ss.

The President of the United States of America, to the Judge of the Circuit Court of the United States, for the Northern District of California—Greeting:

Because in the records and proceeding, as also in the rendition of the judgment of a plea which is in said Circuit Court before the Honorable WM. B. GILBERT, Circuit Judge, between Nannie S. McWhirter, plaintiff and defendant in error, and Connecticut Mutual Life Insurance Company, defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by complaint doth appear, and we being willing that error, if any hath been, should be duly correctéd, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and the proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco on the fifth day of September, 1894, in said Circuit

Court of Appeals, to be then and there held; that the record and proceedings being then and there inspected, the said Circuit Court of Appeals may cause further to be done herein to correct that error which of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable MELVILLE W. FULLER, Chief Justice of the United States Supreme Court, this 9th day of August, in the year of our Lord one thousand eight hundred and ninety-four.

(Seal)

W. J. COSTIGAN,
Clerk of the Circuit Court of the United States,
Northern District of California.

Service of the within writ of error and receipt of a copy thereof admitted this 9 day of August, 1894.

THORNTON & MERZBACH,
Attorney for Plaintiff and Defendant in Error.

The answer of the Judge of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

W. J. COSTIGAN,
Clerk.

[Endorsed]: No. 11,702. United States Circuit Court of Appeals, Ninth Circuit. Connecticut Mutual Life Insurance Company, plaintiff in error, vs. Nannie S. McWhirter, defendant in error. Writ of Error. Filed August 9th, 1894.

W. J. COSTIGAN,
Clerk.

UNITED STATES OF AMERICA.—ss.

The President of the United States to Nannie S. McWhirter—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the fifth day of September next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Northern District of California, wherein Connecticut Mutual Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable J. McKENNA, Judge of the United States Circuit Court for the Ninth Judicial Circuit, this ninth day of August, one thousand eight hundred and ninety-four.

JOSEPH McKENNA,
Judge.

I hereby acknowledge personal service made on me of the above citation this 9th day of August, 1894.

THORNTON & MERZBACH,
Attorneys for Plaintiff.

[Endorsed]: No. 11,752. United States Circuit Court of Appeals, Ninth Circuit. Connecticut Mutual Life Insurance Company, plaintiff in error, vs. Nannie S. McWhirter, defendant in error. Citation on Writ of Error. Filed August 9th, 1894.

W. J. COSTIGAN, Clerk.

[Endorsed]: Filed Sept. 4th, 1894.

F. D. MONCKTON,
Clerk.

